Supreme Court, U.S.
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No. _____
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# In the Supreme Court of the United States

OCTOBER TERM 1993

CASCADE GENERAL, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION OF CASCADE GENERAL, INC.
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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242 PP

## QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's previous decisions and the policies of the National Labor Relations Act, the Court of Appeals erred in enforcing an order of the National Labor Relations Board which required Petitioner to "reimburse" its employees for union fees and dues withheld pursuant to the union security provision of a collective bargaining agreement, when Petitioner acted only as a conduit to forward the dues to the union.

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PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR
THE NINTH CIRCUIT

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Petitioner, Cascade General, Inc. ("Cascade General"), respectfully prays that a writ of certiorari issue for review of the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 5, 1993.

## OPINIONS BELOW

The Opinion of the Court of

Appeals (App. A, infra, 1a) is reported at 9 F.3d 731 (9th Cir. 1993). The Decision and Order of the National Labor Relations Board (App. B, infra, 52a) and the Decision (App. C, infra, 69a) of the Administrative Law Judge are reported at 303 NLRB 656.

## JURISDICTION

The original opinion of the Court of Appeals was filed on June 24, 1993. Cascade General filed a timely petition for rehearing. The Court of Appeals filed an Order and Amended Opinion on November 5, 1993, and denied the petition for rehearing. This Petition is filed within ninety days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 8(a)(1) and (a)(2) of

the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and § 158(a)(2), provide in part:

> "(a) It shall be an unfair labor practice for an employer--
>
> "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> "(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ."

## STATEMENT OF THE CASE

### A. Preliminary Statement

This case arose from an unfair labor practice charge filed by the Metal Trades Council of Portland and vicinity and Pacific Coast Metal Trades District Council, AFL-CIO against Cascade General.

The complaint alleged that Cascade General granted recognition to Oil, Chemical and Atomic Workers Local

1-369, AFL-CIO and subsequently entered into a collective bargaining agreement with OCAW at a time that Cascade General did not employ a representative complement of employees.

After a hearing, the Administrative Law Judge decided that Cascade General did not employ a representative complement of employees when the recognition agreement was signed. The National Labor Relations Board affirmed the Administrative Law Judge's decision. As part of its decision, the Board required that Cascade General "reimburse' its employees for union fees and dues withheld pursuant to the collective bargaining agreement and forwarded to the Union.

Cascade General filed a timely petition for review of the Board's

order with the United States Court of Appeals for the Ninth Circuit. On June 24, 1993, the Court of Appeals issued its opinion [997 F.2d 571] enforcing the Board's order. Circuit Judge Rymer filed an opinion concurring in part and dissenting in part. Judge Rymer's dissent was directed toward the "reimbursement" remedy, which she found punitive and unwarranted.

Cascade General filed a timely petition for rehearing and suggestion for rehearing en banc. On November 5, 1993, the Court of Appeals issued an Amended Opinion and Order [9 F.3d 731] which superseded the earlier opinion. In the Amended Opinion, Judge Rymer amended her concurrence/dissent to include additional reasons why, in her view, the "reimbursement" order of the Board was "doubly unfair" 9 F.3d at

740.

This petition for a writ of certiorari is directed solely to the "reimbursement" issue. For the purpose of this petition, Cascade General concedes that there is substantial evidence to support the conclusion of the National Labor Relations Board relating to premature recognition. However, petitioner contends that the "reimbursement" requirement imposed by the Board is beyond its remedial powers.

B. Summary of Facts Relevant to Question Presented for Review.

The factual setting is accurately summarized by Circuit Judge Rymer in her separate opinion, concurring in part and dissenting in part, as follows:

"The petitioner, Cascade

General, is in the business of ship repair. Because this business depends on relatively short-term contracts for work on individual ships, employment levels in the industry fluctuate frequently. During the year prior to September 1, 1987, Cascade's payroll ranged from a low of three employees in September 1986 to a high of 118 employees in May 1987." (9 F.3d at 737, App. A, infra, 34a).

"On July 27, 1987, James Watts, president of OCAW local, conducted a meeting with Cascade employees. At the end of the meeting, all ten employees present signed authorization cards selecting OCAW as their collective bargaining representative. On July 31, 1987, after a retired NLRB official conducted a card check and certified that the authorization cards represented a majority of Cascade's employees, Cascade recognized OCAW as the collective bargaining representative for its employees. There were sixteen employees on the Cascade payroll at the time the authorization cards were signed and eleven names were listed by management as "regular employees" at the time of the card check."

"Cascade and OCAW reached a collective bargaining agreement which was unanimously ratified at a meeting of employees on

> September 24, 1987. The agreement contained a union security clause with a checkoff provision, pursuant to which Cascade automatically deducted OCAW dues and initiation fees from employee paychecks and forwarded the funds to OCAW." (9 F.3d 738, App. A, infra, 38a-39a).

REASON FOR GRANTING THE WRIT

The dues reimbursement requirement imposed by the National Labor Relations Board in this case is punitive rather than compensatory. It will, if allowed to stand, result in a windfall for employees--who have enjoyed union representation--and an unfair penalty on Cascade General, which has done nothing more than pass the dues on to the union, as required by the collective bargaining agreement. Cascade General will, in effect, be required to pay dues twice. The inequity of such a situation has been recognized by the Courts of

Appeals in a number of cases.

As noted by Circuit Judge Rymer's partial concurrence and partial dissent, the majority's decision is inconsistent and irreconcilable with the Ninth Circuit's own decisions in Intalco Aluminum Corp. v. NLRB, 417 F.2d 36 (9th Cir. 1969), and Kinney National Maintenance Service v. NLRB, 81 LRRM 2733 (9th Cir. 1972).

Additionally, the majority opinion is inconsistent with decisions of other Courts of Appeals (e.g., Hughes and Hatcher, Inc. v. NLRB, 393 F.2d 557 (6th Cir. 1968); NLRB v. Mears, 437 F.2d 502 (3rd Cir. 1970) which held that a reimbursement remedy is punitive where there is no evidence of improper conduct by the employer and the effect of the remedy would be a windfall to the employees who received union representation. As the

National Labor Relations Act applies nationally, uniformity of decisions in this area is important.

As the partial concurrence and partial dissent notes, the Courts of Appeals have "denied dues reimbursement where it will result in a windfall for employees and an unfair penalty for an employer which has passed the dues on to a Union." 9 F.3d at 739.

In Intalco Aluminum Corp. v. NLRB, 417 F.2d 36 (9th Cir. 1969) the Ninth Circuit rejected such a penalty. Cascade General's situation presents at least as compelling a case for rejection of the Board's remedy.

In Intalco, three unions informed the company that they would attempt to organize its employees, and later a fourth union also began a campaign. 417 F.2d at 38. Subsequently, one of

the unions, the Machinists, claimed majority status and demanded recognition. A card check was held by a neutral third party, a representative of the Washington State Department of Labor and Industries, who determined that a majority of employees had signed Machinist authorization cards. As a result, the Company and Union entered into a recognition agreement.

The Board found the recognition improper and ordered it set aside. It also ordered reimbursement of union dues withheld pursuant to the subsequent union contract. Despite the fact that the company in Intalco knew of the competing card solicitation campaigns when it extended recognition, the Ninth Circuit refused to enforce the Board's remedy.

> "On the other hand, the Examiner and Board found an absence of bad faith on the part of petitioner. It is not a case where the company actively cooperated with the union in carrying out a clearly unlawful contract provision. There is no suggestion of anti-union bias or action. The contract has expired. Throughout the contract period the employees did have union representation, even though it was a minority union at the time of recognition." 417 F.2d at 41.
>
> . . .
>
> "In the present case there is no suggestion of company domination of the union or evidence of any active coercion of the employees, except through the contract provisions for dues check off. We have found no cases where the Board has required dues reimbursement in a factual situation similar to this case." Id. at 42.

The partial concurrence and partial dissent in the instant case found Intalco controlling and would have followed it. The majority stated that Intalco is distinguishable from

the present case. However, it is not distinguishable in any meaningful sense.

The majority stated that the two cases are distinguishable because

> "Here, unlike in Intalco, Cascade recognized OCAW as the exclusive bargaining representative at a time when Cascade knew it was going to expand its work force considerably in a short period of time, and there was no finding that Cascade acted in good faith by prematurely recognizing OCAW as the bargaining representative." (App. A, infra, 29a).

However, Intalco was not a representative complement case. It did not turn on the number of employees. It turned on whether it was punitive to require dues reimbursement, where the employer had mistakenly recognized a union which the Board later found did not enjoy majority status--exactly the case

here.

Second, as to the statement regarding "good faith", good faith is not a defense to a representative complement claim and bad faith is not an element. A representative complement case is purely a determination of numbers--whether the number of employees on hand at a particular moment in time is sufficiently representative of the actual complement of employees. Therefore, there would be no occasion for a finding of good faith or bad faith, as it would be irrelevant. However, it is worth noting that there was not a finding of good faith in Intalco either--simply an absence of bad faith. 417 F.2d at 41. In the present case, there was no finding either way. The majority opinion's stated distinction makes no

difference.[1]

As the partial concurrence and partial dissent points out, the Board's remedial order is punitive in nature. It does not "right any wrong or compensate any loss, but merely punishes Cascade for its mistakenly improper conduct." 9 F.3d at 740 (App. A, infra, 48a). Cascade General did not retain the funds which it collected, but paid them to the union, which was not made a party to the National Labor Relations Board proceeding. As such, "the NLRB would require Cascade to reimburse funds which it did not retain." 9 F.3d at 739 (App. A, infra, 44a).

Not only has the Ninth Circuit

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[1]If good faith were an issue, it is amply demonstrated by the fact that Cascade General subjected the card count to the expertise of a retired National Labor Relations Board attorney.

rejected such a punitive order in the past, but other Courts of Appeals have done so as well. NLRB v. Mears, 437 F.2d 502 (3rd Cir. 1970); Hughes and Hatcher, Inc. v. NLRB, 393 F.2d 557 (6th Cir. 1968).

In Intalco, the Ninth Circuit quoted at length from this Court's seminal cases of Virginia Electric and Power Co. v. NLRB, 319 U.S. 533 (1943) and International Ladies Garment Workers Union v. NLRB, 366 U.S. 731 (1961).

Virginia Electric, which upheld reimbursement, involved a company-dominated union. The Union in the present case, OCAW, was not company dominated and, as noted by the dissent, "There is no evidence in the record of knowingly culpable conduct by Cascade in the recognition of OCAW." 9 F.3d at 740 (App. A, infra,

46a).

In International Ladies Garment Workers Union, on the other hand, which simply involved--as here--a mistaken (by the Board's lights) claim of majority status, this Court expressly called attention to the fact that "No penalty is attached to the violation." 366 U.S. at 740. The Ninth Circuit, in Intalco, found this Court's language, calling attention to the fact that no penalty is provided, "significant". 417 F.2d at 41, note 19. Indeed it is! Yet the Court of Appeals has disregarded the Court's language and has put its imprimatur on the Board's punitive action.

At most, the present case is a case of inadvertent recognition of a union in the absence of a "representative complement", an elusive concept at best. The partial

concurrence and partial dissent characterizes the situation as "a close call". 9 F.3d at 740, (App. A, infra, 47a). This is not the type of case where a punitive remedy has ever been approved before. Petitioner requests that this Court grant the requested writ of certiorari to conform the present case to its own prior decisions, those of other circuits and of the Ninth Circuit itself, by eliminating the punitive remedy of the Board's order.

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## CONCLUSION

For the foregoing reasons, Petitioner, Cascade General, Inc., respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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January, 1994

APPENDIX A
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| CASCADE GENERAL,* Petitioner-Cross-Respondent | ) Nos. 91-70547, 91-70605 |
| | ) NLRB No. 36CA-5660 |
| v. | ) |
| NATIONAL LABOR RELATIONS BOARD, | ) ORDER AND AMENDED OPINION |
| Respondent-Cross-Petitioner. | ) |

Petition for Review & Cross Application for Enforcement of an Order of the National Labor Relations Board

Argued and Submitted
March 3, 1993--Portland, Oregon

Filed June 24, 1993
Amended November 5, 1993

Before: Thomas Tang, Cecil F. Poole, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Tang; Partial Concurrence and Partial Dissent by Judge Rymer.

*The Board's Motion to Correct Caption is granted. Thus, the entitled caption is hereby changed from "Cascade General, Inc." to "Cascade General".

## SUMMARY

### Labor and Employment/Unions/ Collective Bargaining

The court of appeals enforced an order of the National Labor Relations Board. The court held that there was substantial evidence to support an order of the Board that was based on the ground that an employer had recognized a union as bargaining agent at a time when the employer did not employ a representative complement of employees.

Petitioner Cascade General was a ship repair business with a work force fluctuating between three and approximately 200 employees, depending upon the demands of the jobs Cascade won through bidding. Dillingham, another ship repair business, averaged a workforce of 600, with fluctuations between ten and 1700. Dillingham went

out of business and Cascade successfully bid on its assets, on the basis of which acquisition Cascade projected an increase in its workforce to 600 to 800 employees. A month prior to Cascade's securing financing to Consummate the Dillingham purchase, Cascade was approached by the Oil, Chemical and Atomic Workers union with a request for recognition as bargaining representative, based on OCAW's representative of a substantial majority of Cascade's employees. Of the sixteen Cascade employees at the time, ten had signed cards indicating a preference for OCAW. Cascade then ha employees in seven of its eleven job classifications. Thus, Cascade recognized OCAW, and later signed a collective bargaining agreement containing a check-off provision requiring Cascade to withhold and

remit to OCAW employee-wage deductions for union initiation fees and monthly dues.

Other unions that had been negotiating with Cascade filed an unfair labor practice charge for premature recognition of OCAW. An ALJ determined that Cascade had violated the National Labor Relations Act, which respondent Board affirmed on the ground that Cascade had not employed a representative complement of employees at the pertinent time. The Board ordered Cascade to reimburse its employees for withheld fees and dues. Cascade petitioned for review, and the Board cross-petitioned for enforcement

[1] The determination of whether a full complement of employees exists involves balancing the interest in having employee representation as early as possible against the interest

in having the maximum number of employees possible participate in selection of a bargaining agent. [2] In this process, the Board may consider the relative certainty of an employer's expected expansion and delay the process accordingly. [3] Here, the Board's decision was based on Cascade's plan to expand its operations to require an average workforce many times greater than at the time of its recognition of OCAW. [4] The record clearly supported the Board's finding that Cascade's expansion was reasonably certain within a short time.

[5] Cascade's conduct in recognizing OCAW and entering an agreement with a mandatory check-off provision at a time when it knew it would shortly be considerably expanding its workforce was improper.

[6] Under the circumstances, the Board's order was a national effectuation of the policies of the NLRA by assisting the disestablishment of the illegally constituted OCAW, severing its connection with Cascade, and restoring employees' freedom of choice. The order should therefore be enforced.

Judge Rymer, concurring in part and dissenting in part, opined that because Cascade did not retain the funds it deducted, because its employees were not unfairly deprived of their dues by ineffective representation, and because there was no knowingly culpable conduct by Cascade, the dues reimbursement order was punitive rather than compensatory and therefore beyond the Board's remedial powers under the NLRB.

COUNSEL

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Fred L. Cornell, Jr., National Labor Relations Board, Washington, D.C., for the respondent-petitioner.

ORDER

The concurrence/dissent of Judge Rymer filed June 24, 1993 is amended as follows:

1) Slip opinion, page 6437, replace the second sentence of the first paragraph of section II, with the following: "Cascade points out that MTC could have filed an unfair labor practices charge against OCAW, but chose not to do so."

2) Slip opinion, page 6439, line 13, add the following at the end of

the first full paragraph: "The NLRB argues that *Kenney, Mears,* and *Hughes & Hatcher* are distinguishable on the ground that the NLRB had no authority to file a complaint against OCAW under § 10(b) of the NLRA, 29 U.S.C. § 160(b), because no unfair labor practices charge was ever filed against OCAW. *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 53 (1954). However, contrary to the NLRB's argument, this distinguishing factor provides an additional basis for denying dues reimbursement in this case. The fact that it was MTC, rather than the NLRB, which chose not to pursue the present litigation against OCAW[1] makes it doubly unfair

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[1] MTC did proceed against OCAW under the AFL-CIO Constitution. This separate proceeding suggests that MTC's decision not to file an NLRB charge against OCAW was not unintentional.

for the employees on whose behalf MTC was acting to recover dues which had been paid to OCAW."

OPINION

TANG, Circuit Judge:

Cascade General ("Cascade") petitions for review of a decision and order issued by the National Labor Relations Board ("Board"), and the Board cross-petitions for enforcement of its July 5, 1991 order. In its decision and order, the Board held that Cascade violated § 8(a)(1) and (2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1) and (2), by recognizing OCAW[2] as the collective bargaining representative complement of the work force. The Board also ordered Cascade, among other things, to reimburse employees

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[2] Oil, Chemical and Atomic Workers Local 1-369,AFL-CIO

for all initiation fees, dues, and other moneys withheld and paid to OCAW. Cascade petitions for review arguing that it properly recognized OCAW as the collective bargaining representative. Cascade also argues that any initiation fees, dues, or other moneys withheld from its employees should be reimbursed by OCAW. We have jurisdiction under 29 U.S.C. § 160(e) and (f). We deny the petition for review and enforce the Board's order.

BACKGROUND

Cascade General, a company engaged in the ship repair business, was formed in September of 1985 and is located in Vancouver, Washington. Cascade operated out of a 16,000 square feet facility which spread over two acres at the Columbia Industrial Park in Vancouver and was

approximately six or seven miles away from Swan Island. On Swan Island, the Port of Portland company operated at the Portland Ship Repair Yard--a major West Coast ship repair center. Cascade increasingly performed ship repair work at Portland Ship Repair Yard. Cascade obtained work by submitting bids on ship repair projects. The amount of work force needed depending on the job's size and complexity. Some jobs produce short periods of work for a few, while other jobs produce long periods of work for hundreds of employees. Prior to July of 1987, Cascade experienced work force fluctuations ranging from a low of three to a high of over 200 employees.

Dillingham Ship Repair ("Dillingham"), a major competitor in the ship repair business, leased a

250,000 square-foot facility from the Port of Portland on Swan Island. Dillingham normally employed about 600 employees, but its work force fluctuated from a low of 10 to a high of 1700 employees. Of these employees, approximately 350 to 400 were represented by the Metal Trades Council of Portland & Vicinity, affiliated with the Pacific Coast Metal Trades Council ("MTC"). Prior to Dillingham's demise, Dillingham and MTC were negotiating over a new collective bargaining agreement. During this time, Michael Fahey, MTC Executive Secretary-Treasurer, orchestrated several protest demonstrations against Dillingham and became aware that some of Cascade's employees were MTC members. In desiring that MTC be the representative for Cascade's

employees, Fahey met with Stephen Anderson, Cascade's president, and with William Lundmark, another Cascade official. Anderson requested Fahey to furnish a letter stated that they had met because such a letter would aid Cascade in obtaining work from ship owners. Fahey, on July 9, sent Cascade a letter stating that the parties met and are continuing to meet to pursue a labor agreement.

On June 30, 1987, no agreement between Dillingham and MTC was reached, and Dillingham went out of business. Its assets were put up for sale. Cascade submitted a bid of $1.2 million for Dillingham's assets. Also, sometime in mid-July, Cascade hired Loy Kahler as its executive vice president whc later became Cascade's president. Kahler had served as a management official of Dillingham

until April of 1987. Towards the end of July, Cascade had put up $50,000 with its bid and agreed to obtain financing for the remaining balance by August 31, 1987.[3] In late July, Cascade projected that the purchase of Dillingham's assets would enable it to expand its work force to 600 to 800 employees.

On July 27, 1987, Cascade was approached by OCAW. OCAW stated that it represented a "substantial majority" of Cascade's employees, and therefore, OCAW requested that it be recognized as the bargaining representative for Cascade's employees. A card check was conducted on July 31, 1987. At that time, there were sixteen employees, ten of whom

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[3] On August 31, 1987, Cascade obtained the necessary financing and purchased Dillingham's assets.

signed cards indicating that they desired OCAW to be their bargaining representative. Also at that time, Cascade had employees in seven of its eleven job classifications. Thus, on July 31, 1987, Cascade recognized OCAW as the employees' exclusive bargaining agent. Also on July 31, Cascade wrote to the U.S. Navy requesting that it be placed on the Navy's list of bidders. The letter informed the Navy that Cascade recently purchased Dillingham's assets and that it will be located at the Dillingham facility on Swan Island. Shortly thereafter, Cascade notified Fahey that discussions between them was no longer possible because Cascade had recognized OCAW.

On August 28, 1987, Boilermakers Local 72 filed a representation petition. On September 1, 1987, MTC

through Fahey also filed a petition seeking to have MTC certified as the bargaining representative for Cascade's employees. On September 9, 1987, Fahey sent Cascade a letter demanding that MTC be recognized as the bargaining representative. On that date, Fahey also filed an unfair labor practice charge against Cascade for prematurely recognizing OCAW as the bargaining representative. On September 24, 1987, Cascade and OCAW entered into a collective bargaining agreement. The agreement contained a union security clause and a check-off provision which required Cascade to withhold and remit to OCAW deductions from employees' wages for initiation fees and monthly dues. On November 28, 1990, an administrative law judge ("ALJ") found Cascade violated the NLRA by recognizing OCAW as the

bargaining representative at a time when Cascade did not employ a representative complement of employees. The Board also ordered Cascade to reimburse its employees for initiation fees and monthly dues withheld by Cascade and remitted to OCAW.

Cascade petitions for review of the Board's decision and order; the Board cross-petitions for enforcement of its order.

## DISCUSSION

### I.

We must uphold the Board's decision "if its factual findings are supported by substantial evidence and if it has correctly applied the law." *SKS Die Casting & Machining, Inc. v. NLRB*, 941 F.2d 894, 988 (9th Cir. 1991) (quotation omitted). "If the Board's application of these findings

is rational and consistent with the Act, the order is entitled to enforcement." *NLRB v. Pacific Erectors, Inc.*, 718 F.2d 1459, 1462 (9th Cir. 1983).

II.

An employer commits an unfair labor practice in violation of §8(a)(1) and (2) of the NLRA, 29 U.S.C. § 158(a)(1) and (2), by recognizing a union as the collective bargaining representative and entering into a contract with such union at a time when the employer did not have a representative complement of employees. *NLRB v. Forest City/Dillon-Tecon Pacific*, 522 F.2d 1107, 1108 (9th Cir. 1975).

[1] "The determination a whether a 'full complement' exists involves striking a balance between the objective of allowing the maximum

number of employees a voice in selecting their bargaining representative and the goal of assuring that the employees have representation as quickly as possible." *Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983). In other words:

> The Board must often balance what are sometimes conflicting *desiderata*, the insurance of maximum employee participation in the selection of a bargaining agent, and permitting employees who wish to be represented as immediate representation as possible. Thus, it would unduly frustrate existing employees' choice to delay selection of a bargaining representative for months or years until the very last employee is on board. Conversely, it would be pointless to hold an election for a very few employees when in a relatively short period the employee complement is expected to multiply many times.

*Id.* n.6 (quotation omitted).

Cascade argues that under *Hayes Coal Co.*, 197 N.L.R.B. 1162, 1163 (1972), the correct test for determining if it prematurely recognized OCAW as the bargaining representative is "whether, at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and the operation is in normal or substantially normal production." (Footnote omitted). Cascade alleges that at the time it recognized OCAW as the bargaining representative, Cascade was operating at normal productions: seven of its eleven job classifications were being utilized, and therefore, it properly recognized OCAW as the bargaining representative. We are not persuaded.

[2] In determining whether a substantial and representative complement exists, the Board may also consider:

> [T]he size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work . . . as well as the relative certainty of the employer's expected expansion. . . .
>
> If a substantial increase in the size of the employee complement is expected with reasonable certainty in a relatively short time, a delay in counting the majority is appropriate.

*Premium Foods*, 709 F.2d at 628 (citations omitted); *see also, Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 48-49 (1987).

[3] Cascade argues that it is impossible to determine the number of employees it will have in the future because its work force fluctuates

dramatically.[4] However, the Board explicitly stated that its decision was not based on Cascade's "ability to predict accurately its future hiring levels, but on its plan--in existence at the time it recognized OCAW--to expand its operations to require, in normal times, levels of employment many times greater than the size of its work force at the time of recognition."

Cascade next argues that under *The Anaconda Company*, 225 NLRB 953 (1976), it is not unlawful to recognize a union as the bargaining representative in an expanding business at a time when its current work force is only a fraction of its projected work force. We disagree.

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[4] For example, prior to July of 1987, Cascade experienced work force fluctuations ranging from a low of three employees to a high of 200+ employees.

Each case is balanced on its particular facts. *See Id.* at 955.

In this instance, Cascade's projected increase of its work force was at a much more accelerated rate than that in *Anaconda*. At the time Cascade recognized OCAW as the bargaining representative, Cascade had sixteen employees, ten of which signed authorization cards indicating that OCAW was the desired representative. However, Cascade knew that it would expand its current work force in the near future. That is, Board specifically found that:

> Respondent [Cascade] knew that its bid for the Dillingham assets had been accepted, and had reason to believe that it would reach a satisfactory lease arrangement with the Port of the Swan Island facilities previously occupied by Dillingham. The new assets, deployed in the Swan Island facilities, had by Kahler's admission supported a

> "normal" employment level in the hundreds. Moreover--again by Kahler's admission--it was necessary, and the Respondent planned, to expand its level of work and employment many times in order to pay off the loan for the newly purchased assets. By contrast, the amount of work justifying the low level of employment in late July would not even have generated enough revenue to pay the rent on the Respondent's then-existing facility, much less on the larger facilities on Swan Island which the Respondent planned to occupy. In these circumstances, even if the few individuals employed in late July represented many or even most of the crafts involves in ship repair, the level of employment at that time is incompatible with a finding that the Respondent was in substantially normal productions, as the term would apply to its expanding operations.

[4] The record clearly supports the Board's findings that Cascade expected with reasonable certainty that its work force would increase substantially within a short period of

time. Cascade testified via its president, Mr. Kahler, that after the purchase of Dillingham's assets it projected a work force of 600 to 800 employees to make the mortgage payments on its $1.2 million financing of the Dillingham's assets purchase, and that Cascade intended to lease 249,000 square feet from the Port of Portland and to operate with as many employees it could sustain. Kahler then acknowledged that 600 to 800 employees was a reasonable number at which its leased facilities could sustain.

Because the Board's factual findings are supported by substantial evidence and it has correctly applied the law, we must uphold its decision. *See SKS Die Casting*, 941 F.2d at 988.

III.

Cascade finally argues that even

if it did violate the NLRB, it should not be required to reimburse union initiation fees, dues, and other moneys, because any such withholdings were paid over to OCAW. Cascade thus contends that any reimbursement should come from OCAW. We disagree.

"The Board had broad discretion in fashioning remedies to effectuate the policies of the Act in light of the circumstances of each case." *Industrial, Technical and Professional Employees Div., Nat'l Maritime Union v. NLRB*, 683 F.2d 305, 308 (9th Cir. 1982) (citation omitted). We only have limited review over the Board's discretionary power. *Id.* We "will overturn the Board's choice of a dues reimbursement remedy only where the reimbursement is shown to be punitive rather than compensatory or where the Board orders reimbursement absent a

showing that employees were coerced in their choice of a bargaining representative." *Id.* (citation omitted).

In *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259 (9th Cir. 1972), the Board found that the employer violated § 8(a)(2) by improperly recognizing a union as the bargaining representative at time when the bargaining unit did not represent a substantial employee complement. *Id.* at 1263. The Board also found that the contract between the employer and the improperly recognized union contained "a union security provision requiring as a condition of employment membership in [such union] and payment to it of initiation fees and monthly dues." *Id.* There, we enforced the Board's order that the employer "reimburse each of the present and former

employees for all initiation fees, dues , and other moneys exacted pursuant to the union security agreement." *Id.* at 1263-64.

The dissent takes the view that here, as in *Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36 (9th Cir. 1969), the Board's reimbursement order is punitive and not remedial because "there is no suggestion of company domination of the union or evidence of any act of coercion of the employees, except through the contract provisions for dues check-off". *Id.* at 42. This view is misplaced because the holding in *Intalco* was confined to its facts. *Id.* at 43 ("we conclude that under the circumstances of this case, the provisions for dues reimbursement is in fact a penalty and can not fairly be said 'to effectuate the purposes of the Act'"); *see also Sheraton-Kauai*

*Corp v. NLRB*, 429 F.2d 1352, 1358 n.6 (9th Cir. 1970) (limiting *Intalco* to its facts).[5]

[5] The present case is distinguishable from the *Intalco* decision. Here, unlike in *Intalco*, Cascade recognized OCAW as the exclusive bargaining representative at a time when Cascade knew it was going to expand its work force considerably in a short period of time, and there was not finding that Cascade acted in good faith by prematurely recognizing OCAW as the bargaining representative. Shortly thereafter, Cascade and OCAW

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[5] The dissent also relies on *Kinney Nat'l Maintenance Serv. NLRB*, 81 L.R.R.M. 2733 (9th Cir. 1972). Although in *Kinney* we denied to enforce the Board's order "insofar as the board would require reimbursement by the company of the past checkoffs of dues," we did not lay out the facts of that case. Therefore, *Kinney* is not very helpful in determining whether the Board's reimbursement order here reasonably effectuates the policies of the NLRA.

entered into an agreement which required that all future employees become members of OCAW and be subject to a mandatory check-off dues security clause. As already stated, such conduct by Cascade was improper.

[6] Under the circumstances of this case, the Board's order is rational in effectuating the polices of the NLRB and should be enforced. *See Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943) (Board's reimbursement order of the checked-off dues should stand "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act"). In this instance, as in *Virginia Electric*, we cannot say that the Board's order does not effectuate the policies of the Act"). In this

instance, as in *Virginia Electric*, we cannot say that the Board's order does not effectuate the policies of the NLRA. The Board's order required Cascade to reimburse its employees for initiation fees and dues, but the Board specifically noted that Cascade need not reimburse "any employees who voluntarily joined OCAW before September 24, 1987, the date the contract became effective." Reimbursement of money exacted from employees who did not freely choose OCAW as the bargaining representatives "promotes the policies of the National Labor Relations Act by assisting in completely disestablishing the illegally constituted union, severing its connection with the employer, restoring freedom of choice to the employee, and encouraging the employee to exercise his rights under the Act."

*Id.* (citation omitted).

As in *Fraser*, Cascade violated § 8(a)(1) and (2) of the NLRA by prematurely recognizing OCAW as the bargaining representative and subsequently entering into a bargaining agreement with OCAW. The agreement contained a union security clause with a checked-off dues provisions. Thus, all Cascade employees were required to be members of OCAW and Cascade was required to deduct and remit to OCAW initiation fees and monthly dues. We have held that the effect of this kind of agreement is to "taint the actions of the union subsequent to the agreement date and in collecting fees and dues from them." *Forest City*, 522 F.2d at 1109. In essence, the employees were coerced to join the union. *See id.* (because the union security and

checkoff agreements compelled new employees to join the union and pay fees and dues the employees were presumably coerced to join the union).

Contrary to the dissent's view, we do not hold that reimbursement is permitted in every case in which there is a union security clause. Our holding is limited to the particular facts involved in this case.

The petition for review is DENIED and the Board's order is ENFORCED.

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RYMER, Circuit Judge, concurring in part and dissenting in part:

I agree with my colleagues that there is substantial evidence in the record to support the National Labor Relations Board's conclusion that Cascade General's recognition of Local 1-369 of the Oil, Chemical & Atomic

Workers (OCAW) violated the National Labor Relations Act. Therefore, I join Parts I and II of the majority opinion. However, because I believe that the dues reimbursement remedy imposed by the NLRB is a punitive measure that is beyond the Board's remedial powers, I dissent.

I

The petitioner, Cascade General, is in the business of ship repair. Because this business depends on relatively short-term contracts for work on individual ships, employment levels in the industry fluctuate frequently. During the year prior to September 1, 1987, Cascade's payroll ranged from a low of three employees in September 1986 to a high of 118 employees in May 1987.

Before September 1, 1987, Cascade was a division of a Washington

clothing store and was located in Vancouver, Washington, across the Columbia River from Portland, Oregon. Cascade did a substantial amount of work at the Port of Portland facility on Swan Island. In mid-1987, a much larger competitor of Cascade located on Swan Island, Dillingham Ship Repair (DSR), went out of business. DSR's work force had fluctuated like that of Cascade, with an average of about 600 employees. During the last months of DSR's existence, it was involved in a dispute over the renewal of a labor contract with the Pacific Coast Metal Trades District Council (MTC), the union which represented its employees. The inability of DSR to resolve this dispute apparently contributed to its decision to cease operations.

The assets and inventory of DSR were to put on sale, and in July 1987

Cascade learned that it had submitted the winning bid of $1.6 million. Cascade with some difficulties obtained financing for the purchase and negotiated a lease from the Port of Portland of most of DSR's former facilities on Swan Island. During the summer of 1987, Cascade hired several DSR management personnel, including Loy Kahler, who became president of Cascade in May 1988. On September 1, 1987, Cascade formally moved its operations to Swan Island in Portland and incorporated in Oregon.

After learning of its successful bid for the assets of DSR, Cascade applied on July 31, 1987 to be on the list of ship repair bidders of the Pacific Military Sealift Command of the United States Navy. Cascade's business increased substantially in size after the move to Swan Island on

September 1, 1987. Cascade had its highest employment total ever of 193 employees during the week of September 6, 1987. Employment dropped to 63 by the end of September but increased to 285 by late October and 471 by the end of 1987. Kahler testified at the hearing in the present case that Cascade projected hiring 600 to 800 employees after purchasing the assets of DSR and that if Cascade's employment levels had not increased substantially, it would have had to liquidate the DSR assets.

Meanwhile, during the summer of 1987, Michael Fahey, executive secretary-treasurer of MTC, had several contacts with Cascade. In late June, Fahey met with Stephen Andereson, president of Cascade, and another Cascade official, William Lundmark. Anderson asked Fahey to

provide a letter stating that MTC and Cascade had met, because such a letter would aid Cascade in obtaining work. On July 9, Fahey sent a letter to Anderson which stated that MTC would "continue to meet with Cascade General to pursue a mutual acceptable labor agreement between both parties." Fahey subsequently continued to maintain contact with Anderson.

On July 27, 1987, James Watts, president of the OCAW local, conducted a meeting with Cascade employees. At the end of the meeting, all ten employees present signed authorization cards selecting OCAW as their collective bargaining representative. Only July 31, 1987, after a retired NLRB official conducted a card check and certified that the authorization cards represented a majority of Cascade's employees, Cascade

recognized OCAW as the collective bargaining representatives for its employees. There were sixteen employees on the Cascade payroll at the time the authorization cards were signed and eleven names were listed by management as "regular employees" at the time of the card check.

Cascade and OCAW reached a collective bargaining agreement which was unanimously ratified at a meeting of employees on September 24, 1987. The agreement contained a union security clause with a check-off provision, pursuant to which Cascade automatically deducted OCAW dues and initiation fees from employee paychecks and forwarded the funds to OCAW.

Anderson informed Fahey in late July 1987 that Cascade could no longer legally continue discussions with MTC.

On August 28, 1987, Boilermakers Local 72 in Portland filed a representation petition with the NLRB to counter the recognition of OCAW. MTC filed a similar petition on September 1, 1987. On September 9, 1987, MTC initiated the instant litigation by filing a charge of unfair labor practices with the NLRB. The NLRB has pursued this litigation only against Cascade, and not against OCAW. Action on the two representation petitions has been delayed pending the resolution of the present case.

Since MTC and OCAW are both affiliated with the AFL-CIO, MTC also initiated proceedings under Article XX of the AFL-CIO Constitution. On April 28, 1988, the president of the AFL-CIO advised OCAW that is representation of the Cascade employees violated the AFL-CIO Constitution. After some

efforts by OCAW to overturn this determination, OCAW on February 14, 1990 informed Cascade of its intention to cease acting as the bargaining representative of Cascade's employees.

II

Cascade argues that it should not be required to reimburse OCAW dues and initiation fees to its employees because these dues were passed through to OCAW. Cascade points out that MTC could have filed an unfair labor practices charge against OCAW, but chose not to do so.

The authority of the NLRB to impose a dues reimbursement remedy was recognized by the Supreme Court in *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533 (1943). We set out a standard for imposing such a remedy in *Industrial, Technical & Professional Employees Div., Nat'l Maritime Union*

*v. NLRB [National Maritime Union]*, 683 F.2d 305 (9th Cir. 1982):

> The Board has broad discretion in fashioning remedies to effectuate the policies of the Act in light of the circumstances of each case. This discretionary power is subject only to limited judicial review. This court will overturn the Board's choice of a dues reimbursement remedy only where the reimbursement is shown to be punitive rather than compensatory or where the Board orders reimbursement absent a showing that employees were coerced in their choice of a bargaining representative.

*Id.* at 308 (citations omitted). *See also Morrison-Knudsen Co. v. NLRB*, 276 F.2d 63, 73-76 (9th Cir. 1960), *cert. denied*, 366 U.S. 910 (1961).

A

A dues reimbursement remedy must be overturned under *National Maritime Union* if the remedy "is shown to be punitive rather than compensatory." 683 F.2d at 308. Courts have denied

dues reimbursement where it will result in a windfall for employees and an unfair penalty for an employer which has passed the dues on to a union.

In *Kinney Nat'l Maintenance Serv. v. NLRB*, 81 LRRM 2733 (9th Cir. 1972), we rejected "reimbursement by the company of the past checkoffs of dues for the reason that we do not believe the purposes of the act would be served by compelling the company to, in effect, pay dues twice." 81 LRRM at 2733. The Third Circuit stated in NLRB v. Mears, 437 F.2d 502 (3d Cir. 1970) that where

> the general counsel [of the NLRB] has chosen not to make the [union] a respondent,... the effect of enforcement of the reimbursement order will be to require a second payment by the employer-respondent[] while the beneficiary of...assistance gets a windfall.

*Id.* at 513. *See also Hughes & Hatcher, Inc. v. NLRB*, 393 F.2d 557, 568 (6th Cir. 1968)("If [the employer] has paid the moneys to [the union], then the Board's order should be directed against that union and not against [the employer].").

Similarly, in the present case the remedy directed solely against Cascade is punitive. First, Cascade paid the dues which is collected to OCAW. As in *Kinney* and *Mears*, the NLRB would require Cascade to reimburse funds which it did not retain. The NLRB argues that Kinney, Mears, and Hughes & Hatcher are distinguishable on the ground that the NLRB had no authority to file a complaint against OCAW under § 10(b) of the NLRA, 29 USC § 160(b), because no unfair labor practices charges was ever filed against OCAW. *See Radio*

*Officers' Union v. NLRB*, 347 U.S. 17,, 53 (1954). However, contrary to the NLRB's argument, this distinguishing factor provides an additional basis for denying dues reimbursement in this case. The fact that it was MTC, rather than the NLRB, which chose not to pursue the present litigation against OCAW[6] makes it doubly unfair for the employees on whose behalf MTC was acting to recover dues which had been paid to OCAW.

Second, there is no evidence that Cascade employees received ineffective representation from OCAW and were thus unfairly deprived of their dues. This case is unlike *Virginia Electric*, where the union in question was "an

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[6] MTC did proceed against OCAW under the AFL-CIO Constitution. This separate proceeding suggests that MTC's decision not to file an NLRB charge against OCAW was not unintentional.

illegal organization and collective bargaining." 319 U.S. at 540. Cascade employees unanimously approved the collective bargaining agreement negotiated by OCAW.

Finally, there is no evidence in the record of knowingly culpable conduct by Cascade in the recognition of OCAW. The demand for recognition of OCAW was initiated not by Cascade but by Watts, the president of the OCAW local. Although Cascade had been dealing with Fahey, the executive secretary-treasurer of MTC, at the time of the OCAW recognition and was thus aware of MTC's interest in organizing at Cascade, there is no evidence that Cascade did anything to impede recognition of MTC. The ALJ found that Stephen Anderson, the president of Cascade, "executed a recognition statement to OCAW without

having any particular reason to do so." However, this evidence shows at most that Cascade preferred OCAW as a bargaining representative to MTC, which is certainly not illegal. Moreover, although Cascade had plans of expansion, it was engaged in substantially normal operations, it was engaged in substantially normal operations and its job classifications were substantially filled when it recognized OCAW, making it a close call whether Cascade's actions were illegal at all. *See Premium Foods, Inc. v. NLRB*, 709 F.2d 623, 628 (9th Cir. 1983).

A lack of culpable conduct by Cascade is entirely consistent with our decision today that Cascade engaged in an unfair labor practice. Recognition of a non-majority union, including premature recognition in a

growing bargaining unit, is illegal "even though done in the good-faith belief that the union had the consent of a majority of employees ...." *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 732 (1961). Under the present circumstances, the NLRB's remedial order does not right any wrong or compensate any loss, but merely punishes Cascade for its mistakenly improper conduct.

B

The decisions on which the majority relies, *NLRB v. Forest City/Dillon-Tecon Pacific*, 522 F.2d 1107 (9th Cir. 1975) and *Fraser & Johnston Co. v. NLRB*, 469 F.2d 1259 (9th Cir. 1972), are not persuasive that dues reimbursement is permitted merely because there is a union security clause. The majority is

correct that a union security clause may constitute the coercion which is required for dues reimbursement. *See Forest City*, 522 F.2d at 1109; *Sheraton-Kauai Corp. v. NLRB*, 429 F.2d 1352, 1357 (9th Cir. 1970); *NLRB v. Jan Power, Inc.*, 421 F.2d 1058, 1063-64 (9th Cir. 1970). However, our decision in *National Maritime Union* specifies both coercion by the employer and a remedial purpose on behalf of the NLRB as prerequisites for dues reimbursement. 683 F.2d at 308.

In *Intalco Aluminum Corp. v. NLRB*, 417 F.2d 36 (9th Cir. 1969) we rejected an order of dues reimbursement where "there [was] no suggestion of company domination of the union or evidence of any act of coercion of the employees, except through the contract provision for

dues check-off." *Id.* at 42. Subsequently, in *Kinney*, we again rejected a dues reimbursement remedy imposed in a case involving a contact with a check-off provision. 81 LRRM at 2733. In the present case, the NLRB's dues reimbursement order is likewise improper because it is punitive in nature.

In both of the decisions cited by the majority, there was a basis for finding a remedial purpose for the Board's dues reimbursement order. The parties in *Forest City* did not contest that the employer's conduct violated the NLRB. 522 F.2d at 1108.[7] The present case is a much closer call, and the records fails to disclose any knowingly culpable conduct by Cascade.

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[7]The employer contended only that it fell within an exception to the NLRA. *Forest City*, 522 F.2d at 1108. The court rejected that contention. *Id.* at 1109.

In *Fraser & Johnston*, the employer failed to bargain in good faith. 469 F.2d 1262-63. There is no evidence of such knowingly improper conduct in the present case.

III

I am mindful of the board remedial powers of the NLRB. The Supreme Court has interpreted the NLRA "as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policy of the Act, subject only to limited judicial review." *Sure-Tan v. NLRB*, 467 US 883, 898-99 (1984). However, in *Premium Foods* we explicitly held that the NLRB exceeds its broad remedial powers when it chooses a dues reimbursement remedy that is punitive rather than compensatory. Therefore, I respectfully dissent.

APPENDIX B
United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASCADE GENERAL

and Case 36-CA-5660

METAL TRADES COUNCIL
OF PORTLAND & VICINITY
AND PACIFIC COAST METAL
TRADES DISTRICT COUNCIL,
AFL-CIO

and

OIL, CHEMICAL AND ATOMIC
WORKERS LOCAL 1-369,
AFL-CIO
Party to the Contract

DECISION AND ORDER

On November 28, 1990, Administrative Law Judge David G. Heilbrun issued the attached decision. The General Counsel, the Respondent, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering

brief.[8]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[9] and conclusions as modified

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[8] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[9] The Respondent excepts to the judge's ruling on the first day of the hearing, allowing the General Counsel to amend the complaint to add an allegation that the card check relied on by the Respondent in granting recognition to OCAW Local 1-369 was invalid because of the involvement and participation of the Respondent's supervisors in the card check. The Respondent also excepts to the judge's finding that the card check was tainted, as alleged. Because of our disposition of the case on other grounds, we need not pass on the merits of either of these exceptions.

The judge concluded that the

and to adopt the recommended Order as modified.

The judge found that the Respondent violated Section 8(a)(2) of the Act, as alleged in the original complaint, by recognizing Oil, Chemical, and Atomic Workers Local 1-369, AFL-CIO (OCAW) as the exclusive bargaining representative of its employees, and by entering into a collective-bargaining agreement with OCAW, at a time when it did not employ a representative segment of its ultimate employee complement. We affirm the judge's finding for the

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Respondent's recognition of OCAW was unlawful for the additional reason that the Respondent did not authenticate the signatures on the cards. We disavow that conclusion. An employer's recognition of a majority union is not rendered unlawful simply because the employer does not authenticate the cards. Windsor Place Corp., 276 NLRB 445 fn. 1 (1985). In the instant case, 7 of the 10 card signers testified at the hearing and verified their signatures.

following reasons, in addition to those discussed by the judge.

The Respondent extended recognition to OCAW on July 31, 1987,[10] during a pay period when only 16 individuals (including 2 stipulated supervisors) were on the payroll. The judge found that, in mid- to late July, the Respondent had been informed that its bid for the assets of Dillingham Ship Repair had been accepted.[11] The amount of the bid was $1.6 million, of which approximately $1 million was for inventory and $600,000 was for tools and equipment. The Dillingham assets together were

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[10] Unless otherwise noted, all dates are in 1987.

[11] The estimated date apparently is based on the testimony of Respondent's vice president for finance, Ernest Brawley. Loy Kahler, the Respondent's president, testified that the bid was accepted in mid-July.

approximately four times the size of the assets previously owned by the Respondent.

Upon learning that it had achieved success in bidding for the Dillingham assets, the Respondent began negotiating with the Port of Portland to take over the facilities on Swan Island that previously had been occupied by Dillingham.[12] Although incorrect in its initial belief that it could assume the leases on those facilities on the same terms as those enjoyed by Dillingham, the Respondent nevertheless quickly secured permission to begin to operate

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[12] On July 31, the Respondent wrote to the U.S.Navy's Pacific Military Sealift Command, in an effort to be placed on the latter's list of bidders. In that letter, the Respondent represented that it had purchased the Dillingham assets and that "our operations department will be located at the Dillingham facility at Swan Island."

out of the Swan Island facilities. In mid-August the Respondent received a proposal from the Port for a month-to-month lease on those facilities, and began leasing the facilities on that basis in September. The Swan Island facilities, which comprised some 90 percent of Dillingham's former leasehold, were several times larger than those originally occupied by the Respondent.

The Respondent's president, Kahler, who had previously been employed by Dillingham, testified that Dillingham's normal employment level had been roughly 600 employees, including 350 to 400 represented by the Metal Trades Council (the Charging Party).[13] Kahler also conceded that

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[13] Kahler stated that Dillingham's employment level varied from as low as 10 to 15 to as many as 1700 employees. Kahler also testified that the

the Respondent could not even have paid the rent on its original, smaller facility--let alone at Swan Island--if it had continued to employ only 10 employees.[14] He further admitted that the Respondent projected hiring from 600 to 800 employees after it purchased the Dillingham assets, in order to pay the mortgage on the purchase.[15]

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Respondent had the ability to employ 600 people with the equipment it had before the purchase of the Dillingham assets, plus what it could have rented and leased. The Respondent's employment records establish, however, that at no time between July 1986 and September 1987 did it ever employ anything even approaching 600 people; the employment level during that period reached a maximum of 118 in May 1987, and did not otherwise exceed 100.

[14] Ten individuals signed OCAW authorization cards.

[15] Kahler stated that the only other option was to liquidate, but that was not the Respondent's intention when it bought the assets.

Against this backdrop, we agree with the judge that, when the Respondent recognized OCAW on July 31, it did not employ a representative complement of the work force it anticipated employing in its soon-to-be-expanded facilities. Thus, on that date, the Respondent knew that its bid for the Dillingham assets had been accepted, and had reason to believe that it would reach a satisfactory lease arrangement with the Port for the Swan Island facilities previously occupied by Dillingham.[16] The new assets, deployed in the Swan Island facilities, had by Kahler's admission

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[16] Indeed, the Respondent on that date affirmatively represented to the Navy that its operations would be at Swan Island. Moreover, as the judge observed, although final agreement on lease terms was not reached until later, there is no indication that the port, as lessor, would have benefited by allowing its facilities to remain unoccupied.

supported a "normal" employment level in the hundreds. Moreover--again by Kahler's admission--it was necessary, and the Respondent planned, to expand its level of work and employment many times in order to pay off the loan for the newly purchased assets.[17] By contrast, the amount of work justifying the low level of employment in late July would not even have generated enough revenue to pay the rent on the Respondent's then-existing facility, much less on the larger facilities on Swan Island which the Respondent planned to occupy. In these circumstances, even if the few individuals employed in late July represented many or even most of the

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[17] As the judge noted, the departure of Dillingham from the Port of Portland would logically have foretold increased opportunities for the remaining employers in the local ship repair industry, including the Respondent.

crafts involved in ship repair, the level of employment at that time is incompatible with a finding that the Respondent was in substantially normal production, as that term would apply to its expanding operations.[18]

In so finding, we fully appreciate the fact that the Respondent's employment level fluctuates considerable overtime, rising and falling significantly even from week to week as the amount of work it is able to secure increases or decreases. We also are aware that, because of the inherent uncertainty regarding the number and magnitude of future contracts, it is virtually impossible for the Respondent to make accurate predictions of its actual

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[18] See Hayes Goal Co., 197 NLRB 1162, 1163 (1972).

future levels of employment.[19] Our decision, however, is based not on the Respondent's ability to predict accurately its future hiring levels, but on its plan--in existence at the time it recognized OCAW--to expand its operations to require, in normal times, levels of employment many times greater than the size of its work

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[19] However, employers who are faced with a demand for initial recognition, such as the Respondent, with significantly fluctuating levels of employment, need not face the difficult task of discerning whether any relatively small number of employees will be found to be a representative complement. Any employer, even one faced with clear evidence of a card majority, has the right to invoke Board processes to determine whether an election should be held and, if so, whether its employees desire union representation, provided it has not engaged in unfair labor practices that impair the election process. Linden Lumber v. NLRB, 419 U.S. 301, 310 (1974). Such an employer, if faced with a demand for recognition, may lawfully refuse recognition; if the employer or union then petitions for an election, the Board will determine whether a representative complement exists, without risk to the employer.

force at the time of recognition.[20]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below[21] and orders that the

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[20] Nor do we rely on the mere possibility, in late July, that future conditions might warrant a hiring increase, or on the fact, standing alone, that employment levels did greatly increase after the move to Swan Island. See Hayes Coal Co., supra at 1163.

[21] We find no merit to any of the exceptions to the judge's recommended Order, which we find consistent with orders issued in similar cases. We shall, however, delete from the Order and notice the statement that nothing therein authorizes the Respondent to withdraw terms or conditions of employment that may have been established pursuant to its collective bargaining agreement with OCAW. See R.J.E. Leasing Corp., 262 NLRB 373 (1982).

In affirming the judge's order requiring the Respondent to reimburse employees for union dues, fees, assessments, and other payments that may have been exacted from them pursuant to the union security provisions of the collective bargaining agreement, we emphasize that the Respondent need not reimburse any employees who voluntarily

Respondent, Cascade General, Portland, Oregon, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

"(b) Maintaining or giving any force and effect to the collective-bargaining agreement between Respondent and OCAW dated September 24, 1987, or any renewal, extension, modification or supplement thereof; provided, however, that nothing in this Order shall require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to

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joined OCAW before September 24, 1987, the date the contract became effective. See A.M.A. Leasing, 283 NLRB 1017, 1025 (1987).

those agreements."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 5, 1991

James M. Stephens, Chairman

Mary Miller Cracraft, Member

John N. Raudabaugh, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the
United States Government

The National Labor Relations Board has found that we violated the National

Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT assist contribute support to OCAW, by recognizing or contracting with that labor organization as the exclusive collective bargaining representative of our employees unless and until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT give effect to our September 24, 1987 contract with OCAW, or to any renewal, extension, modification or supplement thereof, but we are not required to withdraw or eliminate any wage rates or other benefits, terms or conditions of employment which we have given to our employees under such contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL reimburse all our employees, former and present, for initiation fees, dues, assessments and other moneys unlawfully exacted from them under the contract with OCAW.

CASCADE GENERAL

(Employer)

Dated_____By_____

_____

(Title)

This is an official notice and must not be defaced by anyone.

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APPENDIX C
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

CASCADE GENERAL

and Case 36-CA-5660

METAL TRADES COUNCIL OF PORTLAND & VICINITY AND PACIFIC COAST METAL TRADES DISTRICT COUNCIL, AFL-CIO

and

OIL, CHEMICAL AND ATOMIC WORKERS LOCAL 1-369, AFL-CIO

Party to the Contract

Edurado Escamilla, for the General Counsel.
Wayne D. Landsverk, Portland, Oregon, for Respondent.
Stephen (Steve) Cuddy, Seattle, Washington, for the Charging Party
John W. McKendree, Denver, Colorado, for Party to the Contract.

DECISION

Statement of the Case

DAVID G. HEILBRUN, Administrative Law Judge: The case was heard at Portland, Oregon, over a course of 16

trial days spanning February 7, 1989 to July 26, 1989, inclusive. The charge was filed September 9, 1987 by Metal Trades Council of Portland & Vicinity and Pacific Coast Metal Trades District Council, AFL-CIO, called Charging Party or MTC (Portland entity only) where convenient for brevity. The complaint issued November 30, 1987.

This case comprises three principal issues; one procedural and two substantive. The procedural issue is whether General Counsel's Motion to Amend the Complaint, as made on the first day of hearing, was providently granted. The original substantive issue of the case is whether Cascade General, Inc., called Respondent or Cascade General, validly granted recognition and entered into a collective bargaining agreement with

Oil, Chemical and Atomic Workers Local 1-369, AFL-CIO, called Party to the Contract or OCAW where convenient for brevity, at a time when it did not yet employ a representative segment of its ultimate employee complement, in violation of Section 8(a)(1) and (2) of the National Labor Relations Act. The second and later substantive issue, as topic of the amendment, is whether any of ten individuals are supervisors within the meaning of Section 2(11) of the Act, and if so, whether individually or in any combination, they participated in, or themselves constituted, a showing of interest among persons employed by Respondent, so as to nullify the validity of recognition for collective bargaining purposes being extended in this context and on this basis.

On the entire record, including

my observation of the demeanor of witnesses, and after consideration of briefs filed by General Counsel, Respondent and Party to the Contract, I make the following:

## Findings of Fact

### I. Jurisdiction

Respondent is an Oregon corporation with an office and place of business in Portland, Oregon, where it engages in ship repair. In the course and conduct of its business operations Respondent annually has gross sales in excess of $500,000, while purchasing and receiving goods and materials valued in excess of $50,000 directly from sources outside Oregon, or from suppliers within the state which in turn obtained such goods and materials directly from sources outside Oregon. On these admitted facts I find that Respondent

is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and, as also admitted, that MIC and OCAW are each a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Case Background

1. Port of Portland

At a point off the Columbia River about 100 miles inland from the Pacific Ocean, the Port of Portland maintains a principal facility on the northward-flowing Willamette River as an integral part of the business and industry existing in metropolitan Portland, Oregon. The Port is a public entity comprised of a nine-member commission. It actually has three major operating areas, one of which is the Portland Ship Repair Yard located on Swan Island in the

Willamette River. Swan Island is considered an industrial park where, along with the shipyard itself, module construction and general marine activities, there is even unrelated manufacturing taking place. The Ship Repair Yard operates as a uniquely combined public-private facility. There are dry docks, berthing areas, yards, and general equipment on Swan Island, constituting it a major West Coast ship repair location. Other Port of Portland functions, none of which are involved in this proceeding but stated for context, are the separately situated and operated Marine Terminals, and the Portland International Airport, plus real estate held for future riverfront

property development.[22]

Private companies, large and small, operated on Swan Island either as major long-term businesses, or by sporadic appearance for purposes of occasional or specialty work. For many years leading into 1987 the two principal competitors on Swan Island, for major ship repair and related work, were Dillingham Ship Repair (DSR) and Northwest Marine Ironworks (NMI). As typically so in the industry both companies experienced cyclical operations, and in this sense could employ a work force fluctuating from several dozen hourly personnel to several hundred, or perhaps in excess

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[22] The background facts set forth in International Longshoremen's and Warehousemen's Union Locals 40 & 8 (STC Submarine Systems, Inc.), 299 NLRB No. 34 (July 31, 1990), a Board Decision rendered under Section 10(k) of the Act, illustrate one instance of the Port's functional scope and nature.

of 1,000.

2. Dillingham Ship Repair

DSR had been the more prominent of Swan Island operating companies, with an estimate of its hourly work force running to 1,700 persons at the highest peak ever reached. However, the last collective bargaining negotiations looking toward renewal of a labor contract with MTC resulted in impasse by the fall of 1986, and with this DSR implemented objectionable changes to terms and conditions of employment for its unionized work force. A rancorous period of labor-management relations followed for approximately 8 months. MTC did not however engage in strike action against DSR, and its members as represented in this bargaining unit continued to work under normal patterns of utilization.

The situation did not satisfactorily resolve itself, in consequence of which DSR gradually phased out and, except for final winding up, ceased operations on or about June 30, 1987. An entity called Dill Trust was created to liquidate the affairs of DSR and sell off its assets. For purposes of this case, it is known that Dill Trust operated for much of remaining 1987 in fulfillment of this winding up process.[23]

3. Traditional Trade Union Representation

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[23] A pre-existing unfair labor practice complaint of NLRB Region 19 against DSR remained extant. In late 1987 a settlement of this proceeding was achieved, with monetary amounts to be distributed among 750 former shipyard employees of DSR. The settlement was referred to repeatedly in this record. A fuller description of this newsworthy resolution appeared at 133 LRR 251, as published by the Bureau of National Affairs in its weekly service for February 26, 1990.

The Charging Party in this case comprises MTC (Metal Trades Council of Portland & Vicinity) and Pacific Coast Metal Trades Council, the superior entity located in Oakland, California with which MTC is affiliated. By the mid-1980's these two entities had developed a practice of negotiating jointly with employers headquartered at, or operating in conjunction with, the Port of Portland's ship repair facility at Swan Island. This practice yielded a joint contract with such employers, to which an applicable number of AFI-CIO affiliated local unions, plus the Teamsters, were parties. The major established employers at Swan Island with which such a joint contract existed were DSI and NMI. Other employers so organized were the relatively small L & S Marine that operated briefly on Swan Island,

plus an unspecified few subcontractors.

Of the 16 International Unions whose Portland area locals were constituent in MTC, the joint contract at DSI pertained to ten such affiliates while that at NMI pertained to only nine. The implication of this record would identify the International Unions from which these contracted party locals came as the Machinists, Boilermakers, Carpenters, Pipefitters (UA), Electricians, Sheet Metal Workers, Painters, Operating Engineers, Laborers, International Chemical Workers, [24] and again the Teamsters whose readmission to the AFL-CIO was not effective until late

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[24] This labor organization was totally distinct from OCAW; only a principal word being shared in their respective names. See BASF Kyandotte Corp., 278 NLRB 173 (1986).

1987.

4. Community Considerations

Festering labor difficulties between DSR and MTC reached the attention of Oregon's governor, and he appointed Tom Brumm to be a labor liaison person with the Port of Portland effective about May 1, 1987. Brumm was charged with responsibility for generally working toward image-boosting labor tranquility at that facility. He had extensive background in the labor movement of the Pacific Northwest and from this, coupled with his political connections, sought to sophisticatedly mediate the DSR problem. Brumm also worked directly with key Port of Portland commissioners toward the matter of image, and to generally acquaint both new and existing enterprises about the favorable objectives he was expected

to achieve.

Brumm remained in this position for approximately 18 months, during which time he monitored the arrival and growth of the Cascade General as a private enterprise largely filling the gap left by DSR's departure. A former official of DSR had organized another separate enterprise named West State Inc. (WSI), and commenced its operations as a smaller, non-union ship repair company at Swan Island in early 1987. WSI was another private employer that received Brumm's specific attention as it grew in significance at the Swan Island operations. It ultimately became unionized, and by 1988 reached a collective bargaining agreement with MTC for its hourly-paid work force.

5. Cascade General

Respondent originated as an

operating division of a family-owned, retail clothing store located in Goldendale, Washington, and doing business there under the name Ledbetters, Incorporated. In September 1985 Stephen (Steve) Anderson, a part owner of Ledbetters, began Cascade General as a ship, tug and barge repair business located in Vancouver, Washington, a city directly across the Columbia River from metropolitan Portland. Anderson established necessary shop, storage and trailer office facilities of about 16,000 square feet spread over 2 acres at the Columbia Industrial park in Vancouver.

In connection with the startup Andersen employed William (Bill) Lundmark, a person with about 20 years experience in ship repair and a former ship superintendent at DSR. After two

years of general marine repair servicing Cascade General split from Ledbetters, and incorporated separately after first acquiring leases, tools and equipment of DSR. Roughly coinciding with these changes of late summer 1987, Cascade General relocated to the considerably larger premises at Swan Island formerly occupied by DSR for operations that continue to the present.

B. Case Outline

By 1986 and extending into 1987 Cascade General was increasingly performing ship repair and related work over at Swan Island. This was accomplished by transporting employees, tools and equipment necessary to jobs in progress from the Vancouver facility to Swan Island for the actual performance of work there.

When DSR ceased operations

Cascade General accelerated its presence at Swan Island [illegible] new key executive person[illegible] unfolded Michael Fa[illegible] executive secretary-treas[illegible] time, became increasingly [illegible] Cascade General's prese[illegible] possible significance to [illegible] Fahey had been a prime or[illegible] daily protest demonstrations against DSR during the 1986-87 bargaining dispute, and held a position constituting the chief area coordinator for various unions within MTC. Consistent with his purpose Fahey obtained, or encou[illegible] obtaining of authorization cards from any persons employed by Cascade General who he did not recognize as union members formerly working with and among the traditional and established Swan Island ship repair

firms. Additionally, an MTC organizing committee was active on Swan Island during the late spring and summer months of 1987.

Fahey attended a casual, exploratory meeting early that summer at Cascade General's Vancouver headquarters, accompanying leaders of the organizing committee and where Andersen and Lundmark were present to speak for Respondent. Before anything of consequence could be achieved through MTC's interest in the situation, OCAW obtained voluntary recognition from Respondent and these parties reached a labor contract about 2 months later.[25]

C. Procedural History

1. The Instant Case

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[25] All dates and named months hereafter are in 1987, unless otherwise indicated.

After its filing in September this case resulted in early issuance of a complaint. However further proceedings on it were held in abeyance, along with certain contemporaneous representation petitions. This was done pending possible resolution of jurisdictional dispute contentions between MTC and OCAW within the AFL-CIO, by use of its traditional proceedings under Article XX of the organization's constitution. Accordingly no action was undertaken on the complaint from early 1988, when first scheduled for hearing, until approximately one year later when Article XX proceedings had not achieved a definitive resolution. During this hiatus further investigative attention was given the case within NLRB Region 19, resulting in presentation by motion to amend the

"supervisory" issue when the case formally commenced.

2. Article XX Proceedings

Based on such competing representational interests of MTC and OCAW, a proceeding was initiated by the Metal Trades Department of the AFL-CIO to resolve their claims. A presentation was made to Impartial Umpire Howard Lesnick, who ruled a favor of MTC through the issuance of a written "Determination" dated March 17, 1988. Lesnick's rationale was largely based on distinguishing "successorship" doctrine under settled federal labor law from the AFL-CIO's internal policy of fundamentally seeking to preserve "established relationships." The Umpire's award was formally reviewed, and by letter dated October 28, 1988 AFL-CIO President Lane Kirkland advised Joseph

M. Misbrener, OCAW President, as follows:

> In accordance with Section 14 of Article XX of the AFL-CIO Constitution, please be advised that the subcommittee of the AFL-CIO Executive Council, consisting of Secretary-Treasurer Donahue and Vice Presidents Sweeney and Hutchinson, has found the Oil, Chemical and Atomic Workers to be in non-compliance with the determination of the Impartial Umpire in the above-captioned cases.
>
> This finding of the subcommittee follows from the decision of the Impartial Umpire that OCAW's ongoing participation as the exclusive bargaining representative of the employees at the former Dillingham Ship Repair Co. facility, Swan Island, Oregon violates Article XX, and from OCAW's refusal to withdraw from that representation.
>
> Effective this date, therefore, OCAW will be subject to the following provisions of Section 15 of Article XX:

[Sanctions deleted from quotation]

Post-hearing developments in connection with certain unsuccessful Motions to Reopen the Record revealed that by letter dated February 14, 1990 Misbrener had written to Cascade General as follows:

> This letter will confirm General Counsel John W. McKendree's telephone conversation with Wayne Landsverk, counsel for your company, of this afternoon concerning OCAW and Local 1-369's intent to not act as the exclusive collective bargaining representative of the employees of Cascade General, or of any other successor employer to the Dillingham Ship Repair Company, doing ship repair work at the former Dillingham Ship Repair Company facility, Swan Island, Oregon, or any other facility where the employer is doing ship repair work as Dillingham's successor. In addition, OCAW and its Local 1-369 forthwith shall cease and desist from acting in any way as the bargaining representative of those employees that OCAW is not now and does not seek to be, the employees' bargaining representative at the

facility described above.

> You will recall that at our February 8, 1990, meeting, I informed you of my intention to disengage in accordance with the determinations of the AFL-CIO under Article XX of the AFL-CIO Constitution.
>
> Any inquiries you may have concerning this matter should be addressed to our General Counsel.

D. Amendment to Complaint

When counsel for the General Counsel moved to amend the complaint at the opening of hearing on February 7, 1989, he advised that other parties had been notified of such intention 4 days earlier. General Counsel enlarged on this in a specific regard by representing, as the motion recited, that Respondent's counsel had been informed of "a pending investigation on this matter" as early as January 20, 1989. The motion alleged that on or about July 31

Respondent had granted recognition to OCAW based on "a third party authorization card check." Continuing, it alleged further, and in part, as follows:

> ...cardsigners of the authorization cards used for granting voluntary recognition were statutory supervisors and that the card check was an invalid determination of the employees union desires because of the statutory supervisors participation and involvement in the card check.

The attempted amendment was opposed by Respondent and Party to the Contract on collective grounds that it was beyond the limitations period of Section 10(b) of the Act, unrelated to original allegations of the complaint, and inexcusably tardy. After extended colloquy, during which both General Counsel and the Charging Party expressed willingness to accord a

substantial continuance for opposing parties to deal with new issues, the proposed amendment was granted. In briefing the case now, these adversely affected parties argue that granting of the amendment was "clear, serious error" and an "abuse of discretion."

1. Intrinsic Validity

In Labor Board v. Fant Milling Co., 360 U.S. 301, 308 (1959), the Supreme Court discussed the Board's authority to discharge its duty of protecting public rights, holding that the agency's broad investigatory powers of inquiry are not confined to "precise particularizations of a charge." Consistent with Fant Milling, the Board has long required a sufficient factual relationship between specific allegations in the charge and resultant complaint allegations. See Red Food Store, 252

NLRB 116 (1980), and cases cited therein.

Redd-I, Inc., 290 NLRB No. 140 (September 16, 1988), held that in deciding whether complaint amendments are closely related to charge allegations, the Board would apply a closely related test comprised of the following factors. First, the Board would examine whether otherwise untimely allegations involve the same "class," or legal theory, as allegations in the timely-filed charge. Second, the Board would look at whether otherwise untimely allegations arise from the same factual situation or sequence of events as advanced in the pending timely charge. Finally, the Board may consider whether a respondent would raise the same or similar defenses to both allegations. This third

criterion was explained as meaning that a reasonable respondent would preserve similar evidence and prepare a similar case in defending against the otherwise untimely allegations as would have been prepared and preserved in resisting basic and timely allegations of the pending charge. Id., slip op. at 11.

Both Respondent and Party to the Contract contend here that none of the applicable factors defined in Redd-I, Inc. have been satisfied with General Counsel's motion to amend. Further, both these adverse parties cite G.W. Galloway Co. v. NLRB, 856 F.2d 275 (D.C. Cir. 1988) to support their positions. This recent court of appeals decision denied enforcement to G.W. Galloway Co., 281 NLRB 262 (1986), and in doing so involved two essential notions as law of the case.

One was reiteration of the fundamental premise that Section 10(b) of the Act provides how an unfair labor practice charge defines and limits the scope of litigation brought by the Board. More specifically, Galloway also barred freewheeling expansion of Section 8(a)(1) grounded allegations in a complaint, stemming only from the catch-all, boilerplate "others acts" language of the Board's preprinted charge form.[26]

The amendment at issue here arises as an enlargement of theory under Section 8(a)(2), and although Section 8(a)(1) is invoked in the

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[26] In a later application of Redd-I, Inc., the Board overruled past president tending to exempt Section 8(a)(1) complaint allegations from the traditionally "closely related" test, stating in part that it did so "in light of" the court's Galloway decision. Nickles Bakery of Indiana, Inc., 296 NLRB No. 118 (September 29, 1989).

complaint, both originally and as amended, this is done derivatively and not as to impose a Galloway-type analysis on the situation. Thus the tests of Redd-I, Inc. are to be looked at directly, for they are plainly now controlling on the point. As to the class of violation or theory involved, the amended paragraph 6(d) alleges that the card check upon which recognition of OCAW hinged was legally flawed by a bargaining unit populated only with statutory supervisors. Int he larger context of "representative complement" theory, there must be some basic showing of a work force; that is persons being utilized and to be utilized in the business function involved. As contrarily argued, it is true that a representative complement case turns critically on business considerations, both current and those

realistically projected. However this doe snot eliminate an equally compelling requirement that persons within the statutory definition of an equally compelling requirement that persons within the statutory definition of an "employee", as set forth in Section 2(3) of the Act, are at work in the operation, and constitute the group against which other and future changes are to be judged. For this reason the claim that such a group was largely or exclusively composed of statutory supervisors is an allegation that closely relates to the representative complement theory as a matter of how to reasonably view the issue.

The second prong of Redd-L, Inc.'s test is more readily satisfied. Under that it need merely be observed that all dynamics of eventful mid-to-

late summer of 1987 were a resourceful capitalizing on enterprise opportunity, and the managerial, financing, logistical and human deployment efforts at stepping into the void created by DSR's exit stand as one conglomerated factual situation in a single sequence of events.

Finally, I observe that regardless of whether the complaint originally suggested that Section 2(11) of the Act would become a major focus of the case's main issue, this is not necessarily to say that it must have been so couched. Board proceedings are typically, if not notoriously, devoid of discovery and advance disclosure that is routine in most other litigation; hence Respondent could have been equally chagrined had the basis of a representative complement assertion

been the effectiveness of customer procurement efforts as compared to this actual claim of a tainted core to the bargaining unit. The point may be compared to cases of alleged discriminatory discharge allegations under the Act, in which instances a respondent employer is not informed of undisclosed rationale until a government case-in-chief has been presented. Only at that point does such respondent draw on its retained evidence, but without having known in advance whether disparate treatment, pretext, overt animus accompanying the termination, or some other rationale was to be faced. By analogy, therefore, an amendment that generates no more uncertainty than is present with the instances of unamended allegations is not defective pleading under the Redd-I, Inc. test.

The actual context of this case lessens the preservation of evidence factor that the Board repeatedly emphasized in redd-I, Inc. This concern is best viewed as pertaining to specific episodal happenings, as when simple production records or informal supervisory notations would be germane to a defense. The preservation of evidence factor, is not, however, significant when the amendment in question does no more than create a predicate for retracing ongoing and highly visible business operations in terms of how particular people contributed to the process. Further, the Fair Labor Standard Act requires a minimum 2-year retention period for basic records of employees. 29 U.S.C.A. Sect. 211(c); 29 CFR 516.6. Much of this data as to pay and hours worked would be necessary to

analyze the representative complement issue, relative to the always present distinction needed to be drawn between supervisory and non-supervisory personnel.

Most importantly here is the separate fact that when filing its answer to the complaint as originally framed, Respondent saw fit to respond to paragraph 6(a) as follows:

> Answering sub-paragraph 6(a), [Respondent] alleges that Cascade General recognized OCAW after OCAW demanded recognition and after a card count supervised by a retired NLRB attorney and arbitrator established that a majority of Cascade General employees wanted OCAW to be their collective bargaining representative.

This answer, served on other parties December 11, 1987, including dispatch to a now-disavowed address for OCAW, showed that the "card count" was understood early on by Respondent

itself as an important component of its position that recognition of OCAW had been validly extended. By its very nature a card count reference relative to rank-and-file, or more technically-termed statutory employees, demonstrated an awareness present well over a year before trial commenced that general circumstances of a card count by the outside arbitrator would be at issue. Thus, on the third prong of the Redd-I, Inc. "closely related" test, it became a matter reasonably to compose in preparation for defense. Accord: Roslyn Garden Tenants Corp., 294 NLRB No. 40, slip op. AT 4 (May 31, 1989).

2. Due Process

As stated above, General Counsel's Motion to Amend was granted over objections. The hearing was adjourned at that point and did not

resume until March 28, 1989. This was to permit Respondent and Party to the Contract an opportunity to prepare for the continued hearing in terms of expanded allegations being faced. The passage of this approximately 7-week period of time is reasonably sufficient for such preparation, given the close familiarity of the objecting parties to the job functions, work classifications and individuals holding positions allegedly supervisory in nature.

In Vandalia Air Freight, Inc., 297 NLRB No. 164 (March 22, 1990) it was expressly observed that when new matter is presented "well prior to the hearing," there can be no successful claim that respondents have "insufficient time to prepare a defense and present their case." JD slip op. at 12. The same assessment

about sufficiency of the time to prepare would obtain when a substantial recess precedes taking up the newly amended matters. For this reason I consider that fundamental due process rights have been accorded in the situation, and reaffirm granting of this Motion to Amend.[27]

E. Evidence

1. Ship Repair Process

In general terms the ship repair industry is characterized by urgency of operations because of economic loss to the vessel's owner when it is

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[27] The Kellwood, Roure-Dupont, Douds and Soule cases cited in Party to the Contract's brief have been noted, however whether considered singly or interrelatedly these authorities have inconsequential bearing on the point. Their full citations are Kellwood Company, Ottenheimer Bros. Mfg. Div. v. NLRB, 411 F.2d 493 (8th Cir. 1969); NLRB v. Roure-Dupont Mfg., 199 F.2d 631 (2d Cir. 1952); Douds v. International Longshoremen's Ass'n., 241 F.2d 278 (2d Cir. 1957); and Soule Glass and Glazing Co. v. NLRB, 652 F.2d 1055 (1st Cir. 1981), respectively.

unavailable to transport cargo. In this sense a vessel to be repaired is rapidly entered by crews of the various crafts necessary to the process. Illustrative operations by Cascade General have been repair of boilers, pumps, piping, propellers, rudders and shell plate, as well as structural renewal, inspections, electrical work and painting.

The magnitude of a ship repair job can vary both in terms of the vessel size itself and the particular repairs that are needed. Thus some jobs are brief, and require little in terms of hours worked by the necessary crafts. Other jobs, because of either vessel size or the scope of necessary work, may involve hundreds of employees working may weeks until completion. The first phase is safety clearance of tanks and holds by a

marine chemist, following which deck set-up, interior lighting and necessary staging equipment functions occur. Ideally the various crafts coordinate timing and sequence of their particular contribution to the overall ship repair process underway.

2. Respondent's Operational Evolution

a. Vancouver Facility

Respondent had begun with a small nucleus of people; Anderson and Lundmark in charge, using Rich Rohde and Stephen (Steve) Van Domelen as experienced ship repair and marine workers. By the end of 1986 Ed Bittner had been added as an occasional management type, and the craft nucleus enlarged by the hiring of Richard Lightfoot, Monte Canucci, Robert Lindsay, James (Jim) DeSerrano, and Lawrence (Lanny) Mathieu. This

well experienced craft group expanded again in January, when Terry Gardner, Mark Boton and Dennis Eubanks appeared on the payroll for the first time.

The location at Vancouver was a relatively crude assembly of loosely adjoining industrial buildings, with even some unprotected openness and trailers that had been spotted nearby for office and administrative purposes. From the beginning Respondent possessed numerous tools and industrial equipment, including wheeled compressors, sandblasting gear and pickup trucks. It was not uncommon during the first years of operations from the Vancouver base for Respondent's employees to travel onto Swan Island, performing ship repair and related work on vessels that had been brought there.

Frequently this work was taking

place in the midst of demonstrations and general disruption attendant on the DSR labor dispute, leaving Respondent's executives well acquainted with changing circumstances at Swan Island. An opportunity for dramatic action presented itself most tangibly when DSR abruptly ceased operations, and the possibility of essentially replacing it became apparent.

In early-to-mid July the assets of DSR were offered for sale by bid. Cascade General and WSI both sought the assets, competing with two auctioneers who also had submitted bids. In mid-to-late July the director of Dill Trust declared Cascade General's $1.6 million offer as the winning bid. After some dispute with the Port of Portland regarding ownership of permanent

fixtures, Cascade General was allowed to use the former DSR assets on the premises of Swan Island. The next step in this process was to acquire its own separate foothold on Swan Island, and to this end Respondent undertook a course of dealings with the Port of Portland.

By July, Lundmark had been elevated to corporate president of the enterprise, while Andersen as part-owner occupied the position of secretary-treasurer. The corporate entity at this time was still Ledbetters. Loy Kahler was employed by Respondent in mid-July as its executive vice president. He was a former long-service employee of DSR (and its predecessor), in a career culminating as production manager over the entire yard for six years, and latterly its estimator for the bidding

of jobs. By July a management structure had materialized within Cascade General. Dale Krug was in charge of production, and Surendra Menon its manager for contracts administration and estimating. A stipulation of record between the parties establishes that Rohde, Bittner, and Jerry Way, a person possibly titled ship superintendent, were all statutory supervisors at times material to the case.

b. Port of Portland Accessing

One of the early actions was done by Menon as a administrator for Respondent. He wrote to the Pacific Military Sealift Command of the United States Navy in Oakland, California, by letter dated July 31, as follows:

> Per your telecon of this A.M., Cascade General requests a copy of the

> Master Ship Repair Contract in an effort to be on the list of bidders.
>
> Cascade General is a full service ship repair yard that commenced operations in 1985 and is located at 2000 E. Columbia Way, Bldg. 52, Vancouver, WA 98661. Our mailing address is P.O. Box 129, Vancouver, WA 98660, and the telephone number is (206) 699-4934. We have recently purchased all the assets of Dillingham Ship Repair, including material inventory, machinery and equipment, lease-held improvements, rolling stock, office inventory, and hand tools. Our operations department will be located at the Dillingham facility at Swan Island.
>
> If you need further information, please contact me at your convenience.

This letter was answered on August 11 by Department of the Navy Contracting Officer Betty E. Crawford, who advised Cascade General as follows:

> Re: APPLICATION FOR MASTER AGREEMENT FOR REPAIR AND ALTERATION OF VESSELS

Encl: (1) Insurance Requirements
(2) Ship Repair Facility Survey Report (3 copies)
(3) Master Ship Repair Agreement (5 copies)

1. Your letter of 31 July 1987 requested that you be sent the necessary forms to apply for a Master Agreement for the Repair and Alteration of Vessels. Please complete the enclosed forms and provide the following information for our review.

a. Description of plant facilities, (two copies, please).

b. List of officials and the qualification of each for ship repairs, (two copies).

c. A general statement as to the quantity and scope of ship repair work that you have accomplished, (two copies).

d. Financial statement consisting of a current balance sheet or statement on MA Form 151 (minimum financial information), certified by a certified public account or by a responsible official of your firm, (two copies).

e. Insurance coverage in accordance with enclosure (1), (two copies).

f. Ship Repair Facility Survey Report per enclosure (2), Items A through I, (two copies). After receipt of this report you will be contacted to arrange an on-site inspection of your facilities and interview with your officers and supervisory staff by a representative of this Command.

g. Five copies of the Master Ship Repair Agreement, enclosure (3), executed by your appropriate official on Page 1, except for date, and the last page where appropriate. Please read this document carefully, because all work you perform for us will be subject to its provisions.

Meanwhile Respondent's officials had been in contact with the Port of Portland relative to leasing what DSR had vacated. On August 14 Portland Ship Repair Yard Manager Guy J. Alvis wrote to Anderson as follows:

We are pleased to inform you

that the Portland Ship Repair yard can make selected properties previously leased by Dillingham Ship Repair available to your firm on a month-to-month basis. The square footage available are based on our recent walk-through. The rates quoted are based on the package outlined below and are from the schedule dated July 28, 1987.

| RENTALS: | SQ.FT. | RATE | MONTHLY RATE |
|---|---|---|---|
| Bldg 9 (64) | 13,670 | $.3583 | $ 4,898.50 |
| Bldg 4, Bays 8-10 | 96,041 | .2355 | 22,618.78 |
| Bldg 50, Bay 3 | 3,000 | .30 | 900.00 |
| Bldg 63 | 12,667 | .3181 | 4,030.00 |
| Bldg 63A | 8,290 | .1461 | 1,210.94 |
| Open Yard Space | 115,400 | .06 | 6,924.00 |
| Security & Nursing Fee | | | 10,000.00 |
| TOTALS | 249,068 | | $50,582.22 |

Naturally, this offer is subject to the execution of a lease mutually acceptable to both parties. I would appreciate hearing from you at your earliest convenience. Please feel free to call if you have any questions.

Negotiations ensued between the parties based on this letter and the cost quotes it contained, with the

result that a temporary agreement was reached permitting Respondent to begin a move of its chief business operations to Swan Island itself.

The form and timing of such temporary agreement was embodied in two leases of "Improved Spaces," both effective from September 1 through November 30, as formally and legally agreed to by Respondent's chief official and the Port's executive director. The first agreement listed and fully identified various buildings comprising office, warehouse and shop space, plus those with small crane-served shops, large crane bays, fenced yard space, shed and vehicle shop. Here the approximate total leased space of these buildings was 135,000 square feet, predominately as Building 4 in which Bays 8, 9 and 10 were located with a total area of 96,000

square feet itself. The second temporary lease covered nine specific yard space areas, ranging in size from 6,000 to 31,375 square feet and roundly totalling 115,000 square feet in the aggregate.

Both leases permitted either party to terminate the contractual arrangement upon 30 days notice, or it could otherwise terminate by the lessee's default. These leases were ultimately extended on their original "month-to-month" character until spring of 1988, when nontemporary leasing of the premises was fully settled upon.

c. Transitional Phase

With the temporary leases as foothold, and DSR no longer present to compete, Respondent increased its activities at Swan Island. Progressively more and more tools and

equipment were transported for placement among the former DSR assets in preliminary facilities used by Respondent on Swan Island. Furthermore, key personnel who had more typically worked at the Vancouver facility relocated to Swan Island, and began working there as a normal work station. The transitional phase also included more sophisticated management controls as provided by Ernest Brawley, DSR's former vice president of finance and administration. During the summer months of 1987, Brawley was simultaneously a functionary of the Dill Trust liquidating entity and, with a partner, engaging in the business of providing computerized payroll services to Respondent and other clients with hardware that Brawley's subchapter S corporation had acquired from DSR. Finally,

Respondent's principals Andersen and Lundmark had undertaken major financing negotiations with area banks, and were anticipating business loans necessary to the potentially expanding enterprise.

d. September (1987) and Beyond

On September 1 Cascade General was formed as an Oregon corporation, and its preceding form of business wad dissolved. The actual date of September 1 was also significant in that new payroll and record keeping systems started up then. Some employees received pay increases from that point onward, including those who were officially retitled and given explicit responsibility and authority.

After September Kahler's presence and authority was progressively more prominent, and in May 1988 he was promoted to be Respondent's president.

By this time formal titles of vice president were held by Krug, Menon and Brawley, the latter having been officially employed to head finance effective in the preceding October.

One or more persons had been formally designated to head each craft as general foreman or foreman, and hourly pay raises were made effective for those so promoted effective September 1. The fall of 1987 brought a pronounced increase in Respondent's hourly employment level, and after a late year return to less than 100 persons the time after that from 1988 onward has been generally reflective of the industry's cyclical nature.

3. Management Testimony

Kahler testified that he was closely involved in early discussion with Port of Portland representatives relative to Respondent's desired

lease. He originally faced a "phenomenal" increase in cost as compared to what DSR was charged, and this factor, coupled with separately proposed requirements that would impose a significant flat expense to the lessee for security and nurse service, are what kept the lease in a temporary mode for nearly a year. Ultimately, though, Respondent did acquire approximately 90 percent of the facilities formerly used by DSR. Kahler estimated that the related purchase of assets gave Respondent a business capacity potentially warranting the hire of 600-800 hourly employees.[28] Kahler superimposed

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[28] The Military Sealift Command Ship Repair Facility Survey that had been supplied as an enclosure to Crawford's letter was, to all that is known, first completed by Kahler on December 30. After details on the berthing, dry dock, handling and shop facilities possessed by Respondent, that document concluded with a

further testimony on all this by asserting that reliable work force projections were "impossible," because of uncertainty in the bidding, awarding, and workload scheduling process.

Kahler also testified about financing for the purchase of DSR assets. As successful bidder Respondent had made a non-refundable earnest money deposit of $50,000, with 45 days to complete the balance due on $1.6 million. For most of this period a bank loan had looked probable, however several days before an August 31 deadline the bank committed only $250,000. Kahler testified that urgent, last-minute dealings with a financial broker provided the balance

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current (and "normal") showing of 200 skilled with 100 unskilled employees, and a "potential maximum" of 800 and 200, respectively.

due to confirm this purchase.

Anderson testified that he could not have predicted as of July what Respondent's number of employees might be at a future time. He recalled also participating in the lease negotiations, and denied that the Port of Portland had at any time expressed concern about Cascade General being "a non-union company working on Swan Island."

4. Question Concerning Representation

a. Other than OCAW

Fahey testified that he had been generally aware of the presence of an enterprise named Cascade General during the waning days of DSR operations. He was principally occupied during this time, namely approximately first six months of 1987, with the DSR situation, coupled

with an organizing drive at newly formed WSI. As Fahey spent his considerable time at Swan Island dealing with the matters requiring his attention, he was aware that various individuals who he knew well as MTC members, and former co-workers of his own, were employed by Respondent. A person more noticeable than most was Terry Gardner, who Fahey was well acquainted with as an experienced machinist and former employee of major ship repair firms traditionally operating at Swan Island. Fahey viewed the newcomer Cascade General as another potential organizing target, however it was not a priority matter with him both because of other distractions and because he considered that its employees seemed already to be established union members.

The meeting that Fahey did attend

at Respondent's Vancouver office had been arranged by Greg Deblock and Stanley Deuel, both union officials. Its purpose was to acquaint persons running Respondent with MTC's traditional role at the shipyard. This meeting occurred in approximately late June, and was an amicable discussion of respective labor and business objectives. It resulted in Andersen requesting that the unions provide him a letter, to be useful in presenting to ship owners form whom he hoped to acquire work. Fahey undertook follow-up to this request, and by letter dated July 9, which he hand-delivered because of its delay in preparation, wrote Andersen as follows:

> The Metal Trades Council of Portland and Vicinity Organizing Committee has met with the Principals of Cascade General to explore

areas of mutual concern.

1. Give the customers the best service and quality of workmanship possible.

2. Work out methods jointly to keep the cost of repairs and overhauls competitive.

3. Supply Cascade General with the best qualified workman available to meet their Company's goals and objectives.

4. Stress the importance of a safe, working environment.

We will continue to meet with Cascade General to pursue a mutual acceptable labor agreement between both parties.

Mr. Lundmark and Mr. Anderson have stated to us they do not have any problems working with the Metal Trades Council in the future to achieve their goal to meet and satisfy their customers needs.

Please feel free to call me at your convenience if you have any additional questions. I can be reached at (503) 283-6039.

Fahey then attempted to maintain communications with Anderson. He did

so until a point in late July, when Anderson suddenly and surprisingly informed him in a telephone conversation that he could no longer continue normal discussions on advice of counsel. Anderson did explain this was because OCAW had been recognized as collective bargaining representative for hourly employees. Shortly after this Robert Plympton, business manager/secretary-treasurer of Boilermakers Local 72 in Portland, elected to file a representation petition as a tactical step countering the reported OCAW recognition. As soon as he could conveniently do so, Fahey followed this with a representation petition as a tactical step countering the reported OCAW recognition. As soon as he could conveniently do so, Fahey followed this with a representation petition

through the NLRB's Portland Sub-Region for the same hourly bargaining unit of all ship repair crafts. These petitions were filed August 28 and September 1, respectively. Fahey followed his action with a letter dated September 9, written jointly to Respondent's three highest officials. It stated:

> The Pacific Coast Metal Trades District Council and the Metal Trades Council of Portland & Vicinity demand recognition of Cascade General, the successor to Dillingham Ship Repair as the bargaining unit for all production, repair and maintenance employees within the bargaining unit in the employ of the Employer signatory hereto, and shall apply to all work and activities of the Employer in connection with the construction, conversion, repair or scrapping of any vessel on the Pacific Coast, Columbia and Willamette River and their tributaries, including but not limited to, dredges, floating drydocks, offshore drilling vessels, barges, mobile

> drilling platforms, platforms and all component parts, plant equipment, and all auxiliary equipment used in conjunction therewith.
>
> The Pacific Coast District Council Executive Board and the Portland Metal Trades Council representative will be glad to meet with you at your earliest possible date to discuss the above matter.
>
> Mr. Clarence Briggs, Secretary of the Pacific Coast Metal Trades District Council can be reached at area code: 415-636-0500, mailing address is: 8150 Baldwin Street, Oakland, Calif 94621, Mr. Michael T. Fahey Sr. Executive Secretary of Metal Trades Council of Portland and Vicinity, 503-283-6039, P.O. Box 17358, Portland, Oregon 97217.

These petitions, one of the Boilermakers and one of MTC, are the cases blocked, and remaining blocked, by litigation in this proceeding.

b. OCAW

James Watts testified that he has been president of the labor

organization which is here Party to the Contract since 1978. The organization has been known since 1957, and for many years following that date was an affiliate of the International Chemical Workers Union. That affiliation ended in 1974 and for several years the organization remained independent. In 1978 it affiliated with the Oil, Chemical and Atomic Workers International Union, a constituent of the AFL-CIO. Watts has been an official with the organization since 1962, beginning as vice-president and progressing from that to secretary-treasurer until his elevation as president in 1978.

He testified that in the period prior to June (1987), Party to the Contract was an amalgamated local union of approximately 1,600 members. These were spread from Alaska's North

Slope through the general Pacific Northwest area, but in numerical terms principally those members at the Hanford, Washington nuclear facility. A particular component of its employee representation included waterways operations on barges and tugs, particularly as to subsidiaries of the large West Coast Crowley Maritime enterprise.

Watts conducted a meeting with Respondent's employees at the Vancouver worksite on July 27, Watts testified that after he asked any supervisory persons present to excuse themselves, authorization cards for OCAW were signed by all the ten individuals remaining present. Based on the acquisition Watts wrote to Respondent by letter dated July 29, specifying the attention of Anderson "and/or" Lundmark, as follows:

Please be advised that a substantial majority of your workers, excluding clerical, have indicated that they would like to be represented by the Oil, Chemical and Atomic Workers International Union and its Local 1-369. At this time we would respectfully request that you recognize us as the legal bargaining representative for your employees. We have arranged for Richard Stratton, an arbitrator referred by the Federal Mediation and Conciliation Service, to conduct a card check to assure you that an overwhelming majority of your employees desire representation by OCAW Local 1-369. Mr. Stratton and Local Representative Jerry Cramer are prepared to make themselves available at your offices, Friday, July 31, 1987, to make the check. If you are agreeable to making such a check please notify me immediately. I see no sense in going through a costly National Labor Relation election procedure when we have such obvious support amongst your employees.

5. Card Check

The proposed card check took

place on July 31, with OCAW compensating Richard V. Stratton, retired NLRB staff member and privately practicing arbitrator of the vicinity, to carry out this impartial function. It was done at the Vancouver premises, with Anderson providing Stratton a list of employees and William A. (Jerry) Cramer having previously provided him all of the signed cards. The employer's list was typed and contained eleven names as "regular employees" of Cascade General. Stratton retired briefly to consider this material, and returned to advise the parties that a majority of employees, in his view, had designated OCAW as their collective bargaining representative. On this basis Stratton signed a document prepared on his letterhead reading as follows:

> Pursuant to a card check by the undersigned, it is hereby certified that a majority of the employees of Cascade General have selected Oil Chemical and Atomic Workers, Local 1-369 a labor organization, as its exclusive collective bargaining representative in the following unit: All employees excluding office clerical employees, guards, professional employees and supervisors, as defined in the National Labor Relations Act.

On this basis Anderson also signed an addition to the document typed below Stratton's signature which read:

> With the certification of the card check by Richard V. Stratton on July 31, 1987, Cascade General agrees to recognize the Oil, Chemical and Atomic Workers Local 1-369 as the exclusive bargaining agent for all employees of Cascade General -- or any joint ventures that Cascade General has or acquires in the future.

6. Profiles of Employment at Respondent

a. Fluctuation and Payroll

Totals

The case record does not pinpoint levels or extent of utilizing craft employees during Respondent's start-up year 1985 at all. From mid-1986 through calendar year 1987 this information appears as summary listings backed by handwritten weekly payroll sheets. Beginning for September (1987), and allowing slight transitional overlap, the employment data thereafter appears as computer-generated payroll pages with detailed breakouts as to hours worked, gross earnings, and total deductions from the individual's net pay. As to the year 1986, one in which several individuals under scrutiny as claimed supervisors were first employed, a span of near-constant fluctuation in weekly employment levels is shown. Mid-year showed the highest weekly

totals, twice in the 50's and after two pronounced slumps in early September and again in late October the year was finished with an uncharacteristic stability during November and December averaging about thirty employees (Christmas week excluded from the calculation) in the narrow range of 22--34.

Following this half-year background, the first 8 months in 1987, with particular attention to mid-summer, are most significant to the several issues of the case.[29] Late 1986 momentum continued once the second holiday week was past, and for 1st Qtr. 1987 a weekly average of 46.5 was shown in the range of 21--74

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[29] The tabulations immediately following are not exact, nor do they account for the minor effect of persons like Bittner and Rohde, who were stipulated to be statutory supervisors.

employees. In 2nd Qtr. 1987 the average for a full 13-week period increased to about 51 employees. Here quite a markedly wider range existed; 4 workweeks having only 25 or less employees, while back-to-back totals of 118 and 87 appeared in mid-May and the single upsurged week of April 17 with 82 on the payroll.

From all this the case focuses on July, as the eventful month of OCAW organizing and the card check-based granting of exclusive bargaining recognition by Anderson. July began with the same modest total of about 25 which had ended the second quarter, followed by workweeks ending July 10 and July 17 when for both of them only 18 persons were employed. The pay period ending July 24 was the lowest as among the 2-1/2 years in evidence, with only 11 employees even including

Bittner and Rohde. This increased in week ending July 31 to 16, however the total number of hours worked by the 11 employees of July 24 exceeded the 16 of July 31 as 373 and 352, respectively, or averages per person of 34 and 22 hours shown as worked. Of course, each of the ten card-signers for OCAW were on the July 31 payroll, allowing for an informal entry that Bolton took vacation. Neither Bolton not DeSerrano were among the minimal 11 persons employed during the preceding workweek of July 24, however the handwritten payroll sheet for that week shows the starting of Bolton's name but then being crossed out.

August showed a relatively stable employment level, with the four weekly pay periods of that month being 22, 30, 25 and 24 in sequence. The

significant fact that Cascade General reincorporated effective September 1, and Brawley's business service enterprise commenced computerized payroll service to Respondent, clouded an accurate reconstruction of employment until matters settled down by mid-September. What shows from the records in evidence is that 193 persons were employed for a weekly pay period established as ending September 6, and the following week was otherwise still the highest total ever shown for Respondent at 134. The final two weeks of September dropped to 113 and 63, respectively, however 4th Qtr. 1987 started with high numbers and, as shown below, remained there even through the year-end holiday period. By late October 285 persons were employed, and during the final 2 months of the year Respondent

employed from 326 to 471 persons in 5 of the included workweeks.

b. Occupations Utilized

As a prelude to application of law in a "representative complement" case, the type of jobs in use must be known with certainty. Here the summary can be shaded in meaning when trade union organizations are the reference. At another extreme a certain amount of "cross-crafting" was engaged in as Respondent deployed its personnel, in addition to which particular individuals were experienced in more than one occupational field.

Given these factors a fundamental listing of occupations is still apparent, as being those utilized by Respondent in its basic ship repair business. This is so whether viewed while exclusively at Vancouver, during

its transitional and stretched out relocation to Swan Island, or after it had matured into the "major player" among the Port of Portland Ship Repair Yard's permanently based companies as it had given promise of being by early to mid-1987. The occupations are those which were necessary to the overall cycle of marshalling tools and equipment, preparation, undertaking and reliable completion of needed vessel repairs. In these fundamental terms, and referring to late 1987 by which time job classifications were computer-generated (numbers shown parenthetically) the occupations were:

Job Group

1. Inside (shop Machinist[30] (7)
2. Boilermakers (01)

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[30] This occupation was identified as being at a shop location producing tools and steel product for use by those employees actually boarding or working adjacent to the vessel under repair.

3. Carpenters (Shipwrights) (02)
4. Electricians (04)
5. Laborers (05)
6. Machinists (07)
7. Painters (08)
8. Pipefitters (09)
9. Riggers (15)
10. Warehouse (16)
11. Sheetmetal (20)
12. All other (indirect) (22)

These rather precisely recorded classifications differed little from what the industry considered normal and necessary. Using DSR's busy, if not peak, periods as point of reference, Kahler testified that the classification listing would be Boilermaker, Shipwright, Pipefitter, Operating Engineer, Electrician, Sheet Metal (Worker), Painter, Laborer and Rigger, plus the Teamster occupations. Comparably, Anderson testified that his hourly employees in July were the Painter, Welder, Machinist, Mechanic, Electrician and Rigger crafts, plus a Truck Driver.

7. Projects Performed

The facts of employment utilization by Respondent reflected actual vessel repair projects obtained its ongoing operations. As to key year 1987, and early into 1988, these are summarized in G.C. Exh. 15-B, in which two specific jobs of a bid amount exceeding $50,000 were shown for the February-March and May-June (1987) timespan as the vessels "Trinidad Glacier Bay" and "Trinidad Aspen." In addition to these projects, with estimated man-hours running into the thousands, Respondent was otherwise commonly involved in small maritime and waterways repair work in and around the metropolitan area. Additionally it had maintenance work at its own Vancouver premises, or when later set up over the extended time of actually completing a full-

fledged relocation of operations to Swan Island.

Other ships also show as being worked on during the last half of 1987 and into early 1988. According to the tabulation there was vessel repair work of some kind during each month of late 1987, the two earliest of these being based on bids submitted August 25 and September 4. Of these the earlier bid was in the rounded amount of $1.2 million, easily Respondent's largest job of the year (Arco Prudhoe Bay), having estimated manhours for October alone in excess of 30,000.

8. Supervisory Issues

a. General Facts

The essential nature of this industry meant that a diffused sort of authority was present during the performance of available work. This arose from both geographical dispersal

of employees, and, on vessels sometimes running 600'--800' in length, the scattering of employees onto, into, and near to the ship being tended. Additionally, small work groups would often form, if not spontaneously then by accepted practice among these mostly experienced ship repair personnel.

One emblematic factor was extensively covered in testimony by numerous witnesses. This was the point of whether at ship repair companies operating previously and traditionally on Swan Island, plus as to Respondent's personnel both before and after the summer 1987 relocation, the wearing of an all-white hard hat by a person meant this was a designated craft supervisor. While some variations to this practice occurred, the predominant and

persuasive evidence is that the functioning presence of a "white hat" indicated that person was at least viewed, and to a further extent serving, as one authoritatively directing the work of others in the craft.

b. Evidentiary Outline on Individuals in Question

(1) Richard Lightfoot

Lightfoot was not called as a witness during the trial. This individual was first hired by Respondent in December 1986 as the specialist for industrial painting. He remained in fairly constant employment throughout 1987, and coextensive with formalization after Cascade General's reincorporation was designated general foreman for painting by Lundmark effective in September. Lightfoot had considerable

background in this occupation of the ship repair industry, by reason of previous employment at both DSR and NMI.

Robin Ramage has been employed by Respondent since April (1987). He is a boilermaker by trade and at the time of hearing a foreman, as then recently promoted from leadman. Ramage and Lightfoot both formerly worked at DSR, where Lightfoot was the paint general foreman. Ramage testified that Lightfoot had arranged for him to be employed with Respondent by clearing it with Lundmark. At the time Lightfoot described himself as, and Ramage observed him in the performance of, being Respondent's painter foreman. Ramage elaborated with testimony that Lightfoot directed subordinate foreman or leadmen in the assignments of journeymen painters to

particular vessel hull or tank work.

For the period April through August, Lightfoot had the highest hourly pay rate of any person among Respondent's listed main core of 11 employees. In this group he was at $14 per hour, with most others at $13 per hour, and only Terry Gardner at the intermediate $13.50 rate. By September, Lightfoot was coded as a Level 1 Foreman at $14.50 per hour.

(2) Stephen Van Domelen

In this individual's first employment with Respondent in late 1985, he viewed himself as a foreman. He is a boilermaker by trade, and was demoted in late 1986 to continue with Respondent as a craft journeyman. Van Domelen testified that subsequently in late spring 1987 he was promoted back to a foreman position. During the formalized charges of September 1987

he was designated sheet metal senior foreman, with express authority to at least hire employees needed for his function. Van Domelen has approximately 20 years experience in the industry, having previously worked for both DSR and NMI.

Van Domelen testified that during the period from approximately May (1987) through July he fulfilled his status as a foreman by directing other employees in repairing structural members of ships. This was a welding function to bead and weld metal cracks, and Van Domelen exercised the authority to establish actual work procedures and meet scheduling deadlines.

Ramage also testified regarding his observations of Van Domelen, recalling that this apparent foreman supplied job material, adjusted tasks

as special work problems might require, and obtained persons to serve as the mandatory "fire watch" of work in progress.

During the April through August period, Van Domelen was one of the persons paid at a $13 hourly rate. With the September changes he was coded as a Level 2 Foreman at $14 per hour.

(3) Monte Canucci

This individual's original employment by Respondent in August 1986 was as a boilermaker. Effective around October (1987) he was named by Lundmark to be general boilermaker foreman with express authority to hire and fire employees in running Respondent's plate shop. He has worked on Swan Island since the early 70's, both for general industrial companies and, as periodically with

DSR, in ship repair work. His experience background is that of steel fabricator and boilermaker. Van Domelen testified that upon his own demotion in late 1986, Canucci was the person who took his place.

Canucci testified that during the period prior to July 31, he was not officially a foreman, but insofar as work matters were concerned would only speak to other employees about what was not right or being done unsafely. He added that the employees so spoken to would ordinarily correct the work in progress according to his observation and instructions. Canucci relayed timecards of others to Respondent's office, and occasionally distributed paychecks. He denied habitually wearing a white hat in performance of his work, recalling instead that when he did wear a hard

hat it was green in color. During this timespan Canucci was paid at the $13 hourly rate.

Ramage testified that his first 3 days working for Respondent were to run a boilermaker crew on the second shift by a "turnover" from Canucci. The turnover was a procedure of Canucci and Ramage conversing sufficiently long at the shift change to set up a productive and efficient basis for the arriving crew to continue to work in progress. Ramage testified that after the third day he found that Canucci was countermanding his assignments, and for this reason he requested and obtained a drop back to journeyman status. Ramage's observation from that point onward included seeing Canucci handle paycheck problems and issue work instructions. Ramage also testified

that for informal short-term layoffs, Canucci would effectuate this by telling the involved employee to stay home pending a telephone call back from himself or Bittner. Ramage contradicted Canucci by recalling that he usually did wear a white hard hat in the performance of his job.

(4) Robert Lindsay

Lindsay did not testify. Respondent's payroll records show him employed by late 1986, and continuing with much regularity through 1987. During the month of July 1987 he was on the payroll for week endings July 3, 7, 10, and 17, and while not showing on week ending July 24 is noted as being on vacation during week ending July 31. Lindsay continued showing on the payroll during early August workweeks. He appeared on the computerized payrolls in September

with a coding showing his skill craft to be boilermaker.

(5) Terry Gardner

Gardner also did not testify. Respondent's payroll records show him employed by January 1987, and he continued in substantial and regular employment with Respondent for the balance of that year. He is on Respondent's payroll with full hours of employment for each workweek in the significant months of July and August. On the computerized payroll for early September, Gardner is shown as a coded Level 1 Foreman for machinist craft.

Bruce Morace testified that he was hired as a machinist by Gardner is spring 1987. Thereafter he was assigned work by Gardner, and others, such as exact tasks on the discharge valve or pump of an engine room. Additionally, Morace testified that

Gardner had asked him to perform overtime work on occasion.

Robert Enzenbach and Melvin Johnson were other machinists who testified to being hired by Gardner in early 1987. According to the journeymen employees, Gardner later corrected a paycheck problem for each of them.

(6) Mark Bolton

While it is not verified in payroll records for the particular month, Bolton testified that he was actually hired in December 1986 by Rohde, and performed mechanical work within his craft of machinist for a total of 12 hours spread over 2 days at Respondent's Vancouver facility. After another short 4 day stint of employment in January, he was hired for a third time by DeSerrano. This occurred in February, and Bolton

testified that after a short time he was elevated by Gardner from a leadman to running jobs as a foreman. For this he was paid 50 cents an hour more, and had greater responsibility for job accomplishment by other employees, while regularly wearing an identifying white hat. Bolton had approximately 9-1/2 years previous experience in ship repair at the Port of Portland facilities, working for DSR and NMI in the machinist classification.

Bolton testified that by early 1987 the machinist craft function at Respondent had become in charge of Gardner, with DeSerrano as his first assistant. Bolton himself was the third in line of authority after his promotion and pay increase while the Glacier Bay job was underway. He recalled that the total complement of

machinists went as high as 20 for the repair work to this vessel.

Bolton also testified that he quit any employment status at NMI when it appeared the work with Respondent was reasonably steady. While he did experience brief layoffs as the year 1987 passed, he remained in fairly continuous employment there. Notwithstanding these interruptions, Bolton testified specifically that the supervisory configuration of Gardner, DeSerrano and himself, as "number three" foreman in charge of machinists on night shift, continued in effect at least through the month of July.

Morace testified that on several occasions Bolton gave him short-term layoff notices as a "pink slip", and that upon one particular confrontation with Bolton as to work processes he compiled with instructions given.

Respondent's records show that Bolton's pay rate was $12.75 per hour until early May, and then increased to $13 equalling that being paid to Van Domelen, Canucci and others. After the changes in September, Bolton was coded as a Level 2 Foreman at $14 per hour.

(7) James DeSerrano

DeSerrano testified that he was hired by Bittner on November 5, 1986 as a machinist. After Respondent moved its chief operating headquarters to Swan Island DeSerrano began to run jobs, and had the authority to select persons actually to perform authorized overtime. DeSerrano testified that while never expressly told he was a foreman, he "possibly" chewed out employees in the process of guiding their work. DeSerrano denied that during the period January to July any

of the experienced machinists working for Respondent were titled as either superintendent or foreman. He did add that when crew size warranted it, Gardner, Bolton and himself directed the work of machinists. DeSerrano has nearly 10 years experience working in the Port of Portland shipyard, mostly with NMI as a journeyman and leadman, plus lesser time with DSR.

Morace testified that on his first day of reporting for work it was DeSerrano who had him fill out hiring papers, and then gave him a specific job on a ship to be boarded. There were 10 to 20 other machinists already lined up for work that day, and DeSerrano dispersed them throughout the ship to work on specific pieces of machinery, pairing up employees of the group as necessary. Morace also recalled DeSerrano wearing the

distinctive white hat then, and whenever he subsequently saw him at the work site.

William (Jim) Blake testified that early in January, DeSerrano had recruited him for possible work with Respondent. He was quite familiar with DeSerrano as a leadman of the wheel gang when both were NMI employees. When Blake was later laid off from his machinist position at NMI, he sought out DeSerrano and found him running a machinist crew on the Trinidad Aspen job (correcting himself for having first named the vessel Glacier Bay). DeSerrano confirmed work was available for Blake, and he was immediately hired for duties on a rudder job which entailed pulling components, reworking staves and reassembly. Blake also testified that DeSerrano had told how Lundmark first

placed him in control of the machinists department until being supplanted by Gardner, and that he regularly saw both Garner and DeSerrano park their cars inside the shipyard security gate where a pass was required.

DeSerrano was receiving the $13 hourly pay rate from April through August. After payroll changeover in September, DeSerrano appears as a coded Level 2 Foreman at $14.

(8) Lawrence Mathieu

Mathieu testified that he was hired by Respondent on December 6, 1986 for miscellaneous duties of an electrical, plumbing and parts chasing nature. His most recent change of employment was in September 1987, when appointed supervisor of maintenance electricians and support services.

For the ship repair function that

Respondent later became more fully involved with as 1987 progressed, Mathieu performed the actual work of dropping illumination into tanks of vessels, hooking up transformers and regulating the electrical controller of air compressors. On the occasions prior to July when Mathieu performed electrical work along with others, he testified that Rohde seemingly put him in charge to be sure that work was completed within general instructional guidelines. He described the colleagues in such a situation as mostly people who "knew what had to be done", but he was free to correct their work as he saw fit. However, he expressly denied ever wearing a white hat during that portion of his employment with Respondent which preceded September. Mathieu has a general background with a variety of

industrial supply companies of the area.

Ramage testified that he had often seen Mathieu working along with a crew of electricians, and being the one telling others what needed to be done. Ramage also recalled that it was true Mathieu was not the wearer of a white hat during the pre-September period, and in fact followed the unusual practice of not wearing any hat at all.

At the time of being hired by Respondent, Mathieu had been working as a carpenter out of the hiring hall maintained by Local 611. Gerald Krahn, a business representative for the Oregon State District Council of Carpenters, testified that in February he had contacted Mathieu for a job dispatch. Mathieu declined in opening, and in the conversation that

followed stated he was dropping out of carpenter work because of having been hired as a foreman by Respondent for shipyard-type work.

Mathieu's hourly pay rate during the April through August period was $13. After the changeover in September he was coded as a Level 1 Foreman, but for reasons not known was set at an initial pay rate of only $14.

(9) Dennis Eubanks

Eubanks testified that he first started with Respondent in December 1986, and although telling Lundmark at the time that he was an experienced rigger he was actually employed as a machinist to then work with his friend DeSerrano. Eubanks continued with Respondent, and effective September 1987 was appointed supervisor in charge of the rigging department.

This entailed the authority to discipline employees, and the assumed authority to hire and fire when necessary as a designated general foreman.

Eubanks described the rigger craft as one involving movement of heavy equipment by use of cranes, fasteners and lifting gear. The rigger do necessary hook up and sling arrangement, while the cranes are operated by another craft that riggers coordinate with by use of hand signals.

As 1987 progressed Eubanks gravitated more into a combination job as machinist and rigger. He named Lundmark, Rohde and Bittner as the persons in charge of all riggers, adding only that he would make minor assignments to others and fill out work hours on timecards for some of

the other riggers.

Ramage testified that during the general time of spring 1987, Eubanks was in charge of all riggers, and had at least two foremen, one named Parsons, under him in the hierarchy. Ramage added that he had actually observed Eubanks instructing those subordinate foremen in what needed to be done.

For the April through August period Eubanks was paid the hourly rate of $13. After September he was coded as the Level 1 Foreman, with a corresponding $14.50 hourly rate.

(10) Robert Routley

Routley testified that he was hired by Respondent about July 1 as a truckdriver to do "a little bit of everything", including certain warehousing tasks and custodial duties as necessary. In September 1987

Kahler appointed him general foreman over the warehouse and related operations with express authority to hire and fire as necessary. Routley had last been a truck driver at DSR, and was holding that job when it ceased operations. He had maintained Teamster Union membership up to the end, but took a withdrawal card from this labor organization when the final layoff came.

Routley has experience as a warehouseman going back to 1965 with DSR and its predecessor. He described his work after first being employed by Respondent as driving a truck, running the overhead crane, hauling material to jobs, and even sweeping the floors if necessary. One of his first specific assignments, as made by Lundmark, was to canvass the local automobile dealer for a good running

company truck. In the process of doing so Routley test drove a flat bed truck which Lundmark then purchased. Later in his employment Routley was instrumental in the transport of tools, materials and equipment to Swan Island operations from the Vancouver base. In doing so he pulled a 20-foot trailer stocked with drop cords, welding lead torches, ladders and the like. This trailer could then be spotted near the Swan Island job in progress for as long as its contents were needed by the various craft employees.

Routley was the person typically dispatched by Bittner to pick up miscellaneous supplies such as light bulbs, welding rod, steel plate and hardware. In this process he either furnished a purchase order to the vendor, or paid with his own cash

subject to reimbursement. Routley participated in Respondent's relocation to Swan Island, which he viewed as a closing of the main Vancouver site. He recalled the transfer of equipment as requiring 4 or 5 loads on the flat bed truck.

For the period from his employment through August, Routley's hourly rate of pay was $13. After changeover to a computer-based payroll system in September, he was coded as Level 1 Foreman at $14.50 per hour.

c. Other Relevant Evidence

According to Anderson there was periodic meetings held by himself and Lundmark with the individuals in charge of work projects. Anderson identified those he meant as regularly being in attendance to be generally the 10 card signers, plus Richard Deegan, who was utilized in the

painting of vessels more exceptionally than other journeymen. The meetings occurred just prior to the start of day shift, and involved Respondent's executives explaining to those present what they wanted to have done, plus occasionally specifying just who as among the work force should be assigned to particular tasks. Of the group Anderson described as assembling in these instances, Canucci must vividly denied a recollection of ever having attended any "production meeting" of this kind.

Respondent provided life and medical insurance to its various officials and to key employees beginning in 1986. Mathieu was an exception to this coverage, and Routely does not show on the summary of participants because of just being newly added when a listing current for

August was generated. Otherwise all the other card signers are shown as being covered by July with Farwest Insurance Co., and having their monthly premiums paid by Respondent. These programs were handled by office secretary Diana Santas, the person believed by employees also to be the payroll clerk in the time prior to relocation onto Swan Island. For reasons not disclosed both Lightfoot and Eubanks were discontinued form such coverage effective in August.

F. Analysis

1. Threshold Conclusion

The principle of valid authorization cards being used to support a lawful grant of recognition by an employer to the labor organization so designated as a desired collective bargaining representative is found in Snow &

Sons, 134 NLRB 709 (1961), enfd. sub nom. Snow v. NLRB, 308 F.2d 687 (9th Cir. 1962). This case involved several issues in the context of loosely unfolding circumstances that led to a check of authorization cards claimed by be held by the union involved. The disinterested, impartial person performing this card check was a minister, who recorded for the parties that a majority of listed employees had designated the Union as claimed.

Holding that this process was sufficient to support an order to bargain, the Board noted that the card check represented a binding agreement expressly made by the employer and the later attempted repudiation was not challenging "the accuracy or the propriety" of what had been found. In further detailing events

surrounding the carc check this decision termed the process a "signature" check while the court's opinion expressly noted that the minister had "compared the two sets of signatures" using signed W-2 income tax forms in his undertaking.

The facts in Waikiki Plaza Hotel, 284 NLRB 23 (1987) are generally comparable to what occurred here. The Waikiki Plaza case involved parallel contract negotiations by two employers, in the midst of which a question concerning representation arose with regard to an independent union. In this context a hurriedly arranged card check took place as to each separate group of employees, and was carried out on one of the premises by an ordained minister. He considered employee lists furnished separately by each of the employers,

and the independent union's authorization cards. After a brief hitch requiring the independent union to provide certain additional authorization cards for one of the bargaining units, the minister "concluded that a majority was shown" for both of them and signed a certification to that effect.

In a decision adopted by the Board, the view taken of these activities was stated as follows:

> The card check conducted by [the minister] was not of a character to establish majority representation being enjoyed by the [union] for the fundamental reason that no assurances were present of signatures to authorization cards being those of the individuals listed as being employed within the respective units.

In Contemporary Guidance Services, Inc., 291 NLRB No. 9 (1988) "an impartial card check" was desired

between parties as to whom recognition of a union was at stake. Here another cleric was suggested but rejected, and a New York City attorney became the designated person "to check the signatures." After establishing "a method of Verifying signatures" [emphasis supplied], the impartial concluded that a majority of employees listed by the management had authorized the involved union to bargain for them.

Other cases in which the authentication of authorization cards was the issue, involved the precise activity of comparing known signatures to an exemplar. See Heck's Inc., 166 NLRB 186 (1967); Local 707, Motor Freight Drivers, 196 NLRB 613 (1972); The Drackett Company, 207 NLRB 447, 451 (1973) and Allied Products Corporation, 220 NLRB 732, 734, fn. 4

(1975).

The foregoing array of authority convincingly establishes that the Board expects a determined effort in card check situations to assure that signatures on union authorization cards were in fact placed by the individual appearing with that name on a listing of employees. Were this not done the card check procedure would be illusory, because of regardless of how impartial, or dedicated, the third party might be, they simply have no basis to be satisfied that a cursive name-writing was necessarily done by the same actual person as is listed by an employer among its employees. In Waikiki Plaza this failing is what caused the controlling rationale to state that recognition "was tainted from the outset," and I reach the same

conclusion here. What Stratton actually certified to was a simple ability to read the English language and affirm that a typed list of names represented, almost in their total number, the same names as appearing in handwritten form. This is not a reliable basis upon which to grant recognition, and by doing so Respondent has violated Section 8(a)(2) of the Act and derivatively Section 8(a)(1).

Should it subsequently be determined that the foregoing is not a valid basis of decision, I have for such a reason continued with the following analyses. These result in alternative and supplementary holdings to the effect that Respondent is also viewed as having violated Section 8(a)(2) on separate and independent grounds.

2. Substantial and Representative Complement Issue

a. Contentions

General Counsel and the Charging Party contend that Respondent knew full well it would expand dramatically in terms of its operations from after late July 1987, and the entire recognition dynamics involving Richard Stratton was merely an "orchestrating" of unlawfully granted recognition.

Respondent contends that several grounds exist for concluding that its work force in the last week of July was truly representative in terms of company history and business objectives at the time. First, Respondent notes that its level of employment had fluctuated considerably over the approximately two years of operations, as would be expected given the unpredictability of the ship

repair business. Second, Respondent argues that any hopes for growth and prosperity that its officials harbored were simply uncertain of fulfillment. Here it is noted that little future work was assured, and the employees on the payroll in late July were actually working on repair jobs as a regular core of employees. It is also noted that the lease arrangement at Swan Island was tenuous, leaving Respondent no assurance that it could remain there. Respondent contends further that it had no reason to favor any bargaining relationship with OCAW. Contrarily it asserts that given the unsettled business changes of that summer, and uncommitted bank financing of its major equipment purchase, the recognition demand from Watts "could not have come at a worse time."

OCAW contends chiefly that this issue is controlled by Fall River Dyeing & Finishing Corp., 482 U.S. 27 (1987). Arguing generally form the holding in Fall River, OCAW points to the basic fluctuation of operations present in the ship repair industry, and that the retention of key employees during lull periods is both sensible and necessary. OCAW argues that only jobs actually secured should be relevant, and that even an aggressive bidding policy is without significance because it deals only with what is possible, not actual.

b. Authorities

The most appropriately stated test for premature recognition is whether, at the time of recognition, the jobs or job classifications designated for the operation involved are filled or substantially filled and

the operation is in normal or substantially normal production. Hayes Coal Co. Inc., 197 NLRB 1162 (1972). The Board specifically added in Hayes Coal Co. that a determination of premature recognition cannot be predicated on "a possibility that future conditions may warrant an increase in personnel, or on the basis of an increase in personnel subsequent to the granting of recognition."

In Allied Products, supra, an unlawful recognition of a union was prematurely extended when only 11 out of an ultimately anticipated 75 employees were employed, and these were engaged in preparatory work not in the nature of normal production.

In R.J.E. Leasing Corp., 262 NLRB 373 (1982) a similarly unlawful recognition was extended when done on the basis of five employees, following

which the work force immediately increased to 35, 93, and 150 within about a month. The opinion quoted from Cowles Communications, Inc., 170 NLRB 1596, 1610-11 (1968) as follows:

> ...where an employer recognizes a union as the exclusive bargaining representative of its employees on the basis of a majority demonstrated by cards or a petition, as here, such recognition is inappropriate and unlawful if it is granted before the employer has recruited a work force that can be considered substantially representative of his anticipated complement of employees.

See also Bootlegger Trail Inc., 242 NLRB 1255 (1979).

In Herman Brothers Inc., 264 NLRB 439 (1982) the Board found no violation in the granting of recognition where a prompt increase in the work force was "unforeseen" at the time. Anaconda Company, 225 NLRB

953 (1976) also resulted in dismissal of a complaint alleging the Section 8(a)(2) violation of recognizing a union and signing a contract before there may exist "a representative complement of job classifications and/or employees...because of the expanding nature" of operations.

Fall River Dyeing, supra, relied on by Party to the Contract, was a successorship case, a category not well suited to determination of the narrower issue here, nor a theory claimed to be applicable by General Counsel. Premium Foods, Inc. v. NLRB, 709 F.2d 623 (9th Cir. 1983) and Aircraft Magnesium, 265 NLRB 1344 (1982), also cited by OCAW, are again successorship issue cases not of sufficient materiality to the necessary resolution here. Daniel Construction Company, Inc., 133 NLRB

264 (1961), extensively discussed in the OCAW brief, was a proceeding under Section 9(c) of the Act, and similarly neither relevant here nor relied upon by General Counsel.

c. Discussion

Here there was not only substantial upward movement in the number of employees utilized for ship repair operations during 1987, but also a formalization from after September 1 of what had been so casually managed before. While no vessels were berthed for major repair during mid-to-late summer 1987, a definite business undercurrent was underway. As General Counsel correctly notes, the hiring of Kahler was a significant act in connection with the leasing, equipment auction, and financing dynamics going on simultaneously. Although it is true

that mere possibilities are not to be given unjustified weight, the situation at the Portland Ship Repair Yard held every potential beyond mere speculation. The void created by DSR's elimination was bound to be filled in some appreciable way at this major maritime facility of the upper West Coast. Even allowing that WSI was also newly on the scene, and founded by a former chief executive of DSR, the business momentum was with Respondent. This arose both from their more established presence at the facility, and the fact that they attracted a more motivated group of experienced craft workers because of little or no association with the controversial memory of DSR's last years.

Respondent argues that the original lease was only temporary,

however there is no indication that the Port, as lessor and a public entity, was interested in anything less than a full utilization of its premises, with Cascade General as the lead prospect. It is also conjectural that just as the $1.6 million worth of DSR assets were purchased; so too could they be resold if the level of business did not justify their retention. While this argument has a logic to it, the more realistic view is to say that such an audacious step would only be undertaken with a serious intent at business growth. Finally the necessary bank loan to permit this integrated positioning of business capacity was comfortably anticipated, until only the last-minute crisis led to a resourceful alternative.

In more direct relation to the

legal doctrine involved, the representative jobs existing would militate in favor of the legitimacy of OCAW's recognition. While there are certain fringe functions such as the internal machinist who can produce for general industrial customers, and operating engineers, about which little was developed in the record, the work force during the retrenched pay periods of late July were still practically a total cross-section of trade skills needed for ship repair work. What is dramatically different is the increase in personnel that occurred so swiftly after the key date of September 1 had passed. Noting that this was the time of formal reincorporation, and the Brawley had astutely shadowed the evolving circumstances all summer long to ultimately become Respondent's

consultant and then primary financial officer, I believe that operations were neither normal nor substantially so when OCAW was recognized promptly and unquestioningly after the Stratton card check. Given these circumstances, I do not believe the facet of Hayes Coal stating that purely an increase in personnel does not denote unrepresentiveness is a controlling point.

It is also notable that Anderson, contrary to his attempt to depict things otherwise, practically embraced Watt's purposes. Respondent had known long in advance of MTC-oriented representational interests as to its employees, both from Fahey's dealings from a much earlier letter of Plympton dated in 1986, alluding to "the possibility of Cascade General obtaining a Union Contract." With

this background, and given Anderson's matured, and diverse business experience, he could not have failed to understand that his company was a temptation to those in the labor movement. When these factors are weighed against his testimony that he did not understand the card check proceedings, and that he executed a recognition statement to OCAW without having any particular reason to do so, it seems even more plain that Anderson was looking ahead to burgeoning operations, and possessed of an intention not to have dealings with MTC as had contributed so traumatically to the closure of DSR.

D. Holding

Accordingly, I find the increase of employees, particularly when the 16 employed in the workweek of July 31 are compared with the 400 on

Respondent's payroll in November, makes it sufficiently plain that a representative complement was not in Respondent's employ at the time of the recognition based on a card check. On this basis I find there is the separate and independent reason to hold that Respondent violated Section 8(a)(2) as basically alleged in this case.

3. Conclusion Regarding Alleged Statutory Supervisors

a. Contentions

General Counsel originally contended that all ten card signers were statutory supervisors, however a concession appears in the brief to the effect that "the record is insufficient to establish that Robert Lindsay is a statutory supervisor." Other than this General Counsel, with the Charging Party's concurrence,

contends that the remaining nine individuals all exercised at least one of the disjunctive functions of a statutory supervisor as defined in Section 2(11) of the Act, and exhibited other secondary indicia of such authority.

In its contrary view on the issue, Respondent argued that supervisory status had not been established for any of the individuals at the particular time when they signed the OCAW authorization card. Respondent observed only that even with all doubts resolved in favor of General Counsel's allegation, the most shown was indistinct and minor examples of a supervisory function. The testimony of Bolton was cited to exemplify this, insofar as he described the machinist function as one where 90 percent of the time all

those in the craft, meaning to include Gardner and DeSerrano, were simply an indistinguishable team working with the tools.

OCAW contended that for certain limited periods of time a leadman capacity was established for some of those at issue, but this did not meet statutory criteria to show supervisory status. In further development of its arguments, OCAW only briefed the supervisory status issues relative to Routley, Canucci, Van Domelen, Mathieu, Bolton, and DeSerrano.

b. Credibility

The evidence concerning this branch of the case is extensive and often contradictory. Thus as to episodes and the true nature of workplace happenings it is vital to assess the credibility of those offering testimony on the issues.

I am generally persuaded to believe General Counsel's early witnesses, for Morace, Enzenbach, Blake, Johnson and Ramage all exhibited a convincing demeanor. In each case, and to a sufficient extent, they each appeared earnest in recounting what they had experienced, and the true nature of how operations were achieved in this dispersed setting.

As among the remaining rank-and-file witnesses for this issue, actually those whose status was at issue, I credit Van Domelen and Bolton in particular as to their actual roles in the process and that of their colleagues. The witnesses I specifically discredit, where their testimony gives rise to a conflict, are Canucci and Eubanks, both of whom impressed me as vague, evasive and

lacking in conviction as to what they described.

Anderson is also a witness I discredit, and here the rejection of his testimony on this and other issues of the case is quite emphatic. Anderson exhibited almost a studied unconcern for the accuracy of what he was saying, and I find little of value in his testimony, other than as background, chronology, and superficial recounting of events.

c. Guiding Case Authority

In Spring Valley Farms, 272 NLRB 1323 (1984) the Board closely analyzed the duties of a feed delivery manager, holding that a broad, non-routine and responsible discretion was possessed by her as to the hours worked and earnings realized by a group of drivers. The Board specifically explained its holding as based on the

principle that possession of any disjunctively stated type of statutory authority listed in Section 2(11) of the Act was sufficient to confer the status of a statutory superevisor on such a person. As appropriate to this case Rose Metal Products, Inc., 289 NLRB No. 146 (1988) holds that where a senior metal working employee assigns work order tasks among six to eight others, considering their skill and availability in the process, transfers work between them, and corrects their flaws, he is a statutory supervisor even though spending a minimum of 80 percent of his own time performing unit work.

Respondent cites case authority for seasonal industries in which a 50 percent rule, determined by the facts of a complete one year period, establishes the inclusion or exclusion

of persons within a bargaining unit. The Great Western Sugar Company, 137 NLRB 551 (1962). Respondent's other citation on this issue, Westinghouse Electric Corporation v. NLRB, 424 F.2d 1151 (7th Cir. 1970), is uniquely limited to a highly structured work setting a salaried employees possessing a mechanical engineering degree, or its equivalent, for which the Board fashioned a special "50% formula" as to supervisory issues arising from facts of the case.

In Security Guard Services, Inc. v. NLRB, 384 F.2d 143 (5th Cir. 1967), enf. 154 NLRB 8 (1965), the court closely analyzed the true meaning of "independent judgment" in the course of one person in a work force directing the efforts of others. The court emphasized that to reach the level of an activity contemplated by

Section 2(11) of the Act, there must be an assured vigor and substance to directives given, not a mere acting as intermediary or serving in a role where the authority to command is more illusory than real.

d. Discussion

1. Functional Significance

For the most part the individuals at issue were the hands-on cadre for this ship repair enterprise. Except for Routley, all others perserved with Respondent through the eventful first half of 1987, and in apparent recognition of their efforts were propelled into formal positions of authority when Respondent underwent its extensive upsurge in business later that year. By then Lightfoot and Mathieu were both well-entrenched in their respective roles, and the shake-out of authority as between the

Canucci-Van Domelen and Gardner-DeSerrano duos was a settled reality.

The roles of Krug, Rohde, Bittner and Way, from the limited evidence as to them, were such that management direction and control emanated only at sporadic, focused times from each of them. However the key names in higher management remained Anderson and Lundmark, and they plainly exercised this authority over the months of 1987 preceding Kahler's hiring.

In generalizing about the situation I am convinced that a sufficient need for supervisory oversight and direction, to be both authoritative and frequent in its exercise, was present for all the crafts. In general, therefore, I conclude that the three persons frequently named as supervising the principal craft of machinist, and,

except as determined below, the other "craft heads" were instrumental in effectiveness of overall, combined operations. It must be remebered that Kahler did not arrive until well into mid-summer, and he was immediately enmeshed in the several administrative concerns of the business at that time. Finally, a point not touched on in the arguments, but one of considerable importance to me, is the fact that Lundmark, perhaps the most completely versed of Respondent's officials in ship repair work, took sporadic business trips to Japan approximately around July, thus diluting the supervisory scheme and calling more on the residual authority of the craft heads during that significant period.

2. Application of Section 2(11)

Section 2(aa) of the Act reads:

Any individual having

> authority, in the interst of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Based on the facts of this case, and settled Board doctrine as to resolving first-line supervisory issues, it is established form the evidence that Gardner, DeSerrano and Bolton each claimed, possessed and exercised authority to effectively direct others of their craft by the use of independent judgment rooted in their skills and experience. I find the same to be true as to Lightfoot, Van Domelen, Canucci, Mathieu and Eubanks, for in each of these cases

the manifestation differed only in frequency and degree, but not in its essential significance.

3. Secondary Indicia

On the basis of several admissions of having attended production meetings, the spontaneous agreement by Anderson that these did take place with the respective craft heads, and discrediting Canucci's contrary denial, I note first that this is a secondary factor influencing any definitive conclusion on the point. The white hat wearing also militates this way, as does the permission of these specially-recognized employees to park their vehicles inside the security perimeter of the shipyard when reaching work. Further, there was accepted evidence that the three men overseeing machinists regularly used a desk

within a trailer spotted at the Swan Island Premises. Finally, the group at issue is largely set apart by reason of their insurance coverage. This fringe benefit signifies with some impact that Respondent considered them as special individuals in the business scheme.

4. The OCAW Meetings

On the afternoon of July 27, and with Anderson's permission to do so during working hours, Watts conducted a meeting of employees to solicit their authorization for collective bargaining representation. This occurred at the Vancouver facility, where the entire work force was present. Lightfoot informed them all about attending, and as the group assembled to hear Watts they were also joined by Rohde. Watts opened the meeting by asking tht any supervisors

excuse themselves, and upon this Rohde departed. Watts proceeded to describe the benefits of his organization, and upon concluding the entire group of 10 persons present each signed a typical authorization card for OCAW.

These became the cards supplied to Cramer for his card check meeting four days later, following which he returned them to Watts at OCAW's Richland, Washington office. Still later these cards were submitted by OCAW to the Board as intervention in the MTC-generated representation petitions.

On September 24 Watts held ratification meetings with employees now at the Swan Island location of Respondent. A secret ballot procedure was followed leading to unanimous ratification of the contract reached between OCAW and Respondent.

5. The Whiting-Out

The trial involved consideration of the fact that seven of the OCAW authorization cards bore "white-out" opaquing over the line for a statement of the signer's classification. White-out is the brushed on fluid that quickly dries to a covering crust on paper.

The whiting-out had been directed be done by Watts after the July 31 card check. Testimony of Federal Bureau of Investigation document examiner Gary Kanaskie established that upon an official request these whited-out cards long in the possession of NLRB Sub-Region 36 were sent to Washington, D.C. and examined there at the FBI laboratory. Kanaskie testified that by use of lighting enhancement, chemical and photographic procedures he was able to determine in

all but one case that the obscured classification entry was the word "Foreman."

c. Holding

The overall evidence on the supervisory issue of the case shows that most of the persons in quesiton did possess, and had regularly exercised, the authority to responsibly direct work to others at times preceding, and in effect on, July 27 and July 31. The preponderance of secondary indicia in the case, involving habitual wearing of white hats as emblematic of supervisory status in a ship repair facility, confirms and supports the chief outlook above. Further, the candid entry of the term "Foreman" when executing OCAW authorization cards indicates this as the view most of the individuals held of themselves.

On this basis I conclude that Lightfoot, Van Domelen, Canucci, Gardner, Bolton, DeSerrano, Mathieu and Eubanks were at times material to this case supervisors as defined in Seciton 2(11) of the Act. The evidence is insufficient to reach the same conclusion as to Routley, for this individual had infrequent contact with other employees. His participation in a driving caravan for a brief Alaska project was not indicative of supervisory status, and until his new designation in September he functioned essentially as an unclassifiable employee experienced in materials, transportation and generally "trouble-shooting". No contention remains that Lindsay was a supervisor, and the record wouold not support that conclusion in any event.

On this basis I find that the

recognition extended by Respondent to OCAW was again on a separate and independent ground violative of Section 8(a)(2) of the Act, because of the near-complete involvement of supervisors. The apparent bargaining relationship is for this reason void at its inception.

Conclusions of Law

1. Respondent Cascade General is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Oil Chemical and Atomic Workers Local 1-369, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By recognizing OCAW, by executing a collective-bargaining agreement with it, and by maintaining in effect and enforcing the provisions of said contract, which contained

union-security and dues-checkoff provisions, Respondent has rendered, andis rendering, unlawful assistance and support to OcAW, and has interfered with, restrained, coerced and is interfering with, restraining, and coercing its employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

4. The aforesiad unfair labor practices are unfair labor practices affecting commerce within the meaning of Seciton 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent

to withdraw all recognition from OCAW as reprsentative of its employees for purposes of collective bargaining in the appropriate unit herein, unless and until OCAW has been duly certified by the National Labor Relations Board as the exclusive representaitve of such employees and shall also order Respondents to cease giving force and effect to the collective bargaining agreement executed on September 24, or any renewal, modification, or extension thereof; provided, however, that nothing in the Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms, or conditions of employment which may have been established pursuant to those

agreements.[31] In addition, I shall order Respondent to reimburse, with interest, all present and former employees for all initiation fees, dues, and other moneys which may have been exacted from them by, or in behalf of, OCAW. The latter requirement is a remedial measure serving to restore to Respondent's employees sums involuntarily withheld pursuant to the checkoff provision in an unlawfully executed and maintained collective-bargaining agreement or as accepted directy by OCAW. See NLRB v. Forest City/Dillon-Tecon Pacific, 522 F.2d 1107 (9th Cir. 1975); R.J.E. Leasing Corp., supra; Special Service

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[31] As described in Section II.C.2. of this Decision above, the Party to the Contract has already renounced any current interest in representing employees of this employer. While this disclaimer is noted, its full confirmation becomes a compliance matter.

Delivery, Inc., 259 NLRB 993, 994 and cases cited (1982); and Hudson River Aggregates, Inc., 246 NLRB 192 (1979). General Counsel's further remedial requests are denied.

Disposition[32]

Upon the foregoing finding of fact, conclusions of law, and upon the entire record,[33] and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[34]

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[32] The Motions to Reopen Record mayd by Respondent and OCAW are now denied.

[33] The official Reporter has included a Resp. Exh. 4 in the record of this case by adding it in a separate exhibit jacket dated June 2, 1989. In fact this exhibit was identified only during the trial, but never successfully introduced or admitted into evidence.

[34] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived

The Respondent Cascade General, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Assisting or contributing support to the OCAW by recognizing or bargaining with such labor organization as representative of its employees for the purpose of collective bargaining unless and until OCAW is certified by the National Labor Relations Board as the exclusive representative of such employees pursuant to Section 9(c) of the Act.

(b) Maintaining or giving any force and effect to the collective bargaining agreement between Respondent and OCAW dated September 24, 1987, or any renewal, extension,

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for all purposes.

modification or supplement thereof; provided, however, that nothing in this Order shall authorize or require the withdrawal or elimination of any wage increase or other benefits, terms or conditions of employment which may have been established pursuant to those agreements.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exerecise of the rights guaranteee them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Withdraw and withhold all recognition from OCAW as the exclusive collective-bargaining representative of its employees unless and until it has been duly certified by the National Labor Relations Board as the

exclusive representative of their employees in an appropriate unit.

(b) Reimburse all former and present employees for all initiation fees, dues, assessments and other moneys, if any, withheld from or paid by them, in the manner provided in the "Remedy" section of this Decision.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Portland, Oregon facility copies of the attached

notice marked "Appendix."[35] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 19, in writing, within 20

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[35] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "POSTED BY ORDER OF THE NATIONAL LABOR REALTIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATE COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

days from the date of this Order, what steps they have taken to comply herewith.

Dated: November 28, 1990

/S/David G. Heilbrun
Administrative Law Judge

APPENDIX

NOTICE OF EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States
Government

WE WILL NOT assist or contribute support to OCAW, recognizing or contracting with that labor organization as the exclusive collective-bargaining representative of our employees unless and until it has been certified as such representative by the National Labor Relations Board.

WE WILL NOT give effect to our September 24, 1987 contract with OCAW, or to any renewal, extension, modification or supplement thereof, but we are not authorized or required

to withdraw or eliminate any wage rates or other benefits, terms or conditions of employment which we have given to our employees under such contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL reimburse all our employees, former and present, for initiation fees, dues, assessments and other moneys unlawfully exacted from them under the contract with OCAW.

CASCADE GENERAL
(Employer)

Dated_____By_____
Representative Title

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 222 SW Columbia - Room 401, Portland, Oregon 97201-5878, Telephone (503) 326-3085.

APPENDIX D
NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| CASCADE GENERAL, INC. | ) | |
| | ) | Nos. 91-70547 |
| Petitioner/Cross-Respondent, | ) | 91-70605 |
| | ) | |
| | ) | ORDER |
| v. | ) | |
| | ) | |
| NATIONAL LABOR RELATIONS BOARD, | ) | |
| | ) | |
| Respondent/Cross-Petitioner. | ) | |

BEFORE: TANG, POOLE and RYMER, Circuit Judges.

Judge Rymer filed an order amending her dissent and votes to grant rehearing but rejects the suggestion for rehearing en banc. Judges Tang and Poole vote to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for

rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
APR 6 1994
OFFICE OF THE CLERK

No. 93-1246

# In the Supreme Court of the United States

OCTOBER TERM, 1993

CASCADE GENERAL, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTION PRESENTED

Whether the National Labor Relations Board acted within its discretion in ordering petitioner to reimburse its employees for union dues and initiation fees exacted pursuant to an unlawful agreement with a union, notwithstanding that petitioner had remitted those sums to the union.

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# In the Supreme Court of the United States

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CASCADE GENERAL, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-51a) is reported at 9 F.3d 731. The decision and order of the National Labor Relations Board (Pet. App. 52a-68a) and the decision of the administrative law judge (Pet. App. 69a-216a) are reported at 303 N.L.R.B. 656.

### JURISDICTION

The judgment of the court of appeals was entered on June 24, 1993. A petition for rehearing was denied on November 2, 1993. Pet. App. 217a-218a. The petition for a writ of certiorari was filed on January 31, 1994. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In September 1985, petitioner commenced operations as a ship, tug, and barge repair business in Vancouver, Washington, which is directly across the Columbia River from metropolitan Portland, Oregon. Pet. App. 82a. In the summer of 1987, petitioner acquired the assets of Dillingham Ship Repair (Dillingham), one of the principal firms operating at the Portland Ship Repair Yard (Repair Yard). Petitioner relocated its operations to Dillingham's former facility at the Repair Yard. *Id.* at 14a & n.3, 73a-74a, 76a, 83a, 108a. In the mid-1980s, employers operating at the Repair Yard, including Dillingham, developed a practice of negotiating collective-bargaining agreements jointly with the Metal Trades Council of Portland & Vicinity and the Pacific Coast Metal Trades Council (collectively, MTC).[1] *Id.* at 12a, 78a. In late June and early July 1987, MTC met with petitioner to acquaint it with MTC's traditional role at the Repair Yard and to pursue a mutually acceptable labor agreement. *Id.* at 124a-125a. Those discussions broke off, however, when, on July 31, 1987, petitioner recognized a local union of the Oil, Chemical, and Atomic Workers (OCAW) as the exclusive bargaining representative of its employees. *Id.* at 55a, 79a, 126a, 130a-133a. Petitioner determined that a majority of its employees had signed authorization cards, but it had only 16 individuals on its payroll at the time. On September 24, 1987, petitioner and OCAW executed a labor contract contain-

[1] Dillingham ceased operations in 1987 as a consequence of its inability to negotiate a renewal of its labor contract with MTC. Pet. App. 76a-77a.

ing a union security clause and a check-off provision, which required petitioner to withhold and remit to OCAW deductions from employees' wages for initiation fees and monthly dues. *Id.* at 14a-16a. Within a few months, petitioner's workforce grew dramatically, rising to nearly 500 employees by the end of 1987. *Id.* at 37a, 120a n.28.

2. On September 9, 1987, MTC filed an unfair labor practice charge against petitioner with the National Labor Relations Board (Board) and, on November 30, 1987, the Board's General Counsel issued a complaint alleging that petitioner's recognition of OCAW violated Section 8(a)(2) and (1) of the National Labor Relations Act (Act).[2] Pet. App. 70a-71a. After a hearing, an administrative law judge (ALJ) concluded that petitioner's recognition of OCAW violated Section 8(a)(2), because "a representative complement was not in [petitioner's] employ at the time of the recognition based on a card check."[3] *Id.* at 189.

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[2] Section 8(a)(2), 29 U.S.C. 158(a)(2), in relevant part, makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization." Section 8(a)(1), 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section 7]" of the Act, 29 U.S.C. 157.

[3] The ALJ found that petitioner learned in mid-to-late July 1987 that the director of a trust created to sell Dillingham's assets had accepted its bid to purchase Dillingham for $1.6 million; that "such an audacious step would only be undertaken with a serious intent at business growth"; that "the business momentum was with [petitioner]" during the summer of 1987 to fill "[t]he void created by [Dillingham's] elimination"; and that, on December 30, 1987, petitioner advised the United States Navy's Military Sealift Command that it had a current (and "normal") workforce of 200 skilled and 100 unskilled employees, with a "potential maximum" of 800 skilled and 200 unskilled employees. Pet. App. 108a, 120a n.28,

Further, the ALJ concluded that petitioner violated Section 8(a)(1) by maintaining and enforcing the union security and dues check-off provisions of the OCAW contract. *Id.* at 206a-207a. To remedy petitioner's unfair labor practices, the ALJ ordered petitioner, *inter alia*, to reimburse, with interest, present and former employees for all initiation fees and dues paid by them pursuant to the OCAW contract.[4] *Id.* at 209a.

The Board affirmed the ALJ's unfair labor practice findings, finding that it was petitioner's "plan—in existence at the time it recognized OCAW—to expand its operations to require, in normal times, levels of employment many times greater than the size of its work force at the time of recognition." Pet. App. 62a-63a. The Board also upheld the ALJ's reimbursement order. *Id.* at 52a-67a. It noted, however, that "[petitioner] need not reimburse any employees who voluntarily joined OCAW before September 24, 1987, the date the contract became effective." *Id.* at 63a n.21.

3. The court of appeals affirmed the Board's unfair labor practice findings and enforced its remedial order. Pet. App. 1a-33a. The court explained that "[a]n employer commits an unfair labor practice in violation of [Section] 8(a)(1) and (2) of the [Act] * * * by recognizing a union as the collective bargaining representative and entering into a contract with such union at a time

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184a, 185a. Moreover, the ALJ found that, when petitioner recognized OCAW on July 31, 1987, petitioner "was looking ahead to burgeoning operations, and [was] possessed of an intention not to have dealings with MTC as had contributed so traumatically to the closure of [Dillingham.]" *Id.* at 188a.

[4] The ALJ also ordered petitioner to withdraw recognition from OCAW, and to cease giving effect to the OCAW contract and any renewal, modification, or extension thereof. Pet. App. 207a-208a.

when the employer [does] not have a representative complement of employees." *Id.* at 18a. The court concluded that "[t]he record clearly supports the Board's findings that [petitioner] expected with reasonable certainty that its work force would increase substantially within a short period of time" after its recognition of OCAW.[5] *Id.* at 24a-25a.

The court of appeals rejected petitioner's contention that, even though its recognition of OCAW violated the Act, it should not have to reimburse employees for their union initiation fees and dues that it withheld pursuant to the OCAW contract, because it had turned those sums over to OCAW. Pet. App. 25a-26a. The court observed that "[t]he Board has broad discretion in fashioning remedies to effectuate the policies of the Act in light of the circumstances of each case." *Id.* at 26a. The court concluded that, in the circumstances presented, "the Board's order is rational in effectuating the policies of the [Act] and should be enforced." *Id.* at 30a. The court explained that reimbursement " 'promotes the policies of the National Labor Relations Act by assisting in completely disestablishing the illegally constituted union, severing its connection with the employer, restoring freedom of choice to the employee, and encouraging the employee to exercise his rights under the Act.' " *Id.* at 31a (quoting *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 540 (1943)).

Judge Rymer dissented in part. Although she agreed with the majority that substantial evidence supported the Board's unfair labor practice findings, in her view the Board's reimbursement order was "a punitive

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[5] Petitioner does not challenge the finding of an unfair labor practice in this Court. Pet. 6.

measure that is beyond the Board's remedial powers." Pet. App. 33a-34a.

## ARGUMENT

1. Petitioner contends (Pet. i, 8, 15) that, since petitioner merely acted as a "conduit" in transmitting union initiation fees and dues to OCAW, the Board's order requiring it to reimburse the employees for those sums, as a remedy for petitioner's unfair labor practice in recognizing the union, is punitive and is not entitled to enforcement. There is no merit to that contention.

Section 10(c) of the Act, 29 U.S.C. 160(c), vests the Board with "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review." *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883, 898-899 (1984); see *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994) (Board's remedial orders "merit the greatest deference"). In *Virginia Electric & Power Co.* v. *NLRB*, 319 U.S. 533, 541 (1943), the Court found "manifestly reasonable" a Board order that required an employer to reimburse employees for dues collected unlawfully. In that case, the employees had been compelled to pay dues to a union that the employer had unlawfully created and to which it had accorded closed-shop and check-off privileges. Even though the employer had remitted those sums to the union, the Court sustained the reimbursement order, explaining that such an order "returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company whose unfair labor practices brought about the situation." *Ibid.*

Contrary to petitioner's contention (Pet. 16), *Virginia Electric* is directly applicable here, notwithstanding that OCAW, unlike the union there, was not "company domi-

nated." Petitioner unlawfully recognized an independent union and entered into a union-security clause requiring the employees to pay dues and fees to the union as a condition of continued employment. That recognition and entry into a labor contract constitute "support" that is proscribed by Section 8(a)(2) and (1) of the Act. Moreover, the union security clause warrants the inference that those employees who "joined" the union after execution of the agreement may well have been motivated by the compulsion of the unlawful union-security clause.[6] Accordingly, in this situation, no less than in the case of a company-dominated union, the Board, with court approval, has ordered that the employees be reimbursed for fees and dues withheld from them under the unlawful union security agreement. See, *e.g.*, *Local 1814, Int'l Longshoremen's Ass'n* v. *NLRB*, 735 F.2d 1384, 1404-1405 (D.C. Cir.), cert. denied, 469 U.S. 1072 (1984); *NLRB* v. *Hi-Temp, Inc.*, 503 F.2d 583, 586-587 (7th Cir. 1974); *NLRB* v. *Raymond Buick, Inc.*, 445 F.2d 644, 645 (2d Cir. 1971); *Sheraton-Kauai Corp.* v. *NLRB*, 429 F.2d 1352, 1357-1358 (9th Cir. 1970).

The fact that MTC elected not to file an unfair labor practice charge against OCAW, so that the Board had no jurisdiction over the union party to the unlawful agreement with petitioner, does not deprive the Board of authority to direct a reimbursement order against petitioner alone. In *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 54 (1954), the Court rejected a similar contention. There, the Board required a union to reimburse employees who had been unlawfully discharged at the

[6] The first proviso to Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3), authorizes the employer to enter into a union-security agreement only with a union that represents a majority of the employees in an appropriate bargaining unit.

union's behest, when the offending employer had not been joined in the case and therefore was not compelled to share financial liability for the discharges. The Court explained that "[i]t does not follow that because one form of remedy is not available or appropriate in a case, as here, that no remedy should be granted." *Ibid.* In this case as well, the Board may seek to restore the employees to the position they would have occupied, if they had not been unlawfully compelled to support OCAW, even though the Board does not have jurisdiction over one of the joint tortfeasors.

Petitioner's claim (Pet. 17) that the Board's reimbursement order conflicts with *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961), is incorrect. In that case, while the employer had entered into a labor contract with a minority union, the contract did not include any union-security provision. See *id.* at 734. The Court's observation, *id.* at 740, that "no penalty is attached to the [employer's] violation" referred to the fact that, because the labor contract did not require employees to join the union or pay union dues, the Board's remedy had been limited to requiring that the employer withhold recognition from the minority union and cease giving effect to the contract. *Id.* at 735, 739-740.[7]

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[7] The Board's reimbursement order in this case is also consistent with this Court's decision in *Local 60, United Brotherhood of Carpenters* v. *NLRB*, 365 U.S. 651 (1961). In that case, the Court set aside a reimbursement order issued against a union because there was no reasonable inference that the payments had been coerced by the unlawful agreement, since "[a]ll of the employees affected by the present order were union members when employed on the job in question." *Id.* at 654. By contrast, in this case OCAW purported to represent only ten employees who signed authorization cards prior to its recognition by petitioner. Pet. App. 130a.

2. Petitioner contends (Pet. 9-10) that the court of appeals' decision conflicts with *NLRB* v. *Mears*, 437 F.2d 502 (3d Cir. 1970), and *Hughes & Hatcher, Inc.* v. *NLRB*, 393 F.2d 557 (6th Cir. 1968). In *Mears*, the court declined to enforce the Board's reimbursement order based on two factors: (1) the General Counsel's failure to issue a complaint against the union enabled it to retain the employees' dues; and (2) the Board's remedial order directed the employers involved to continue making royalty payments to a separate union welfare fund to finance future employee benefits, which the court found was "a more substantial focus for employee interest in the [union] than the dues." 437 F.2d at 513. The latter element does not exist in this case.

In *Hughes & Hatcher*, "the record [did] not disclose" whether the employer was holding the initiation fees and dues "in escrow" pending the court's decision, or had already remitted those sums to the unlawfully assisted union. 393 F.2d at 567-568. In dictum, the court opined (without addressing this Court's decisions in *Virginia Electric* or *Radio Officers' Union*) that, if the latter scenario were correct, "then the Board's order should be directed against that union and not against [the employer]." 393 F.2d at 568. The Sixth Circuit has not addressed the reimbursement issue squarely since *Hatcher & Hatcher*, nor has that court subsequently

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To the extent that they signed cards voluntarily, those employees are not entitled to reimbursement under the Board's order. *Id.* at 63a n.21. The reimbursement order applies only to the other employ-ees who joined OCAW *after* the contract and the coercive thrust of its union-security clause became effective.

applied the dictum of that decision to deny enforcement of a Board reimbursement order.[8]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1994

[8] Petitioner also claims (Pet. 10-16) that the decision in this case is inconsistent with the Ninth Circuit's prior decision in *Intalco Aluminum Corp.* v. *NLRB*, 417 F.2d 36 (1969). A claimed intracircuit conflict does not warrant this Court's attention, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), and, in any event, the court of appeals explained why the two cases are distinguishable. See Pet. App. 29a (noting that petitioner, unlike the employer in *Intalco*, knew that its business was expanding when it recognized the union, and was not found to have acted in good faith in prematurely recognizing the union).